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IN THE

Supreme Court of the United States

October Term, 1989

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, PAA CHAPTER, AFL-CIO,

Petitioner,

against

PAN AMERICAN WORLD AIRWAYS, INC. and PAN AMERICAN CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

When an airline and its parent company have made an agreement with a union that represents a class of the airline's employees, to assign to those employees work of a certain description which may be required by any subsidiary acquired by the parent in the future, may a claim for damages based upon an alleged violation of that agreement be brought by the union directly to a Board of Adjustment for resolution?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
OPINIONS	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	5
Introduction: the Need to Grant this Petition	5
A. THE RAILWAY LABOR ACT REQUIRES THAT DISPUTES ARISING FROM COLLECTIVE BARGAINING AGREEMENTS, INCLUDING WORK ASSIGNMENT DISPUTES, BE SUBMITTED TO BOARDS OF ADJUSTMENT	7
B. THE CLAIM OF THE UNION HEREIN IS NOT WITHIN THE EXCLUSIVE JURISDICTION OF THE NATIONAL MEDIATION BOARD	9
1. Definition of the Role of the NMB in Representation Disputes	9
2. The Doctrine of the Exclusive Jurisdiction of the NMB to Consider Certain "Representational Issues"	12
3. Practical Effect of Damages Award	15
4. Effect of the Decision Below: Voiding a Lawful Contractual Provision	16
5. Comparison of Case at Hand with *AFA* v. *Delta*	18
CONCLUSION	21

PAGE

APPENDICES

Appendix A Opinion of the United States Court of Appeals for the Second Circuit 1a

Appendix B Opinion of the United States District Court for the Southern District of New York ... 7a

Appendix C Collective Bargaining Agreement:
Article I—Recognition and Scope 20a
Appendix U—Letter Agreement 27a

Appendix D FEIA Grievance #6276 ..... 29a

Appendix E Amendment of FEIA Grievance #6276 ..... 31a

Appendix F Affidavit of James Jouver 33a

Appendix G Affidavit of David Rosen 36a

Appendix H Statutes: Relevant Provisions of The Railway Labor Act 39a

TABLE OF AUTHORITIES

CASES	PAGE
AFA v. *Delta Airlines, Inc.*, 879 F.2d 906 (D.C. Cir. 1989) *petition for cert. filed*, 58 U.S.L.W. 3242 (U.S. Sept. 15, 1989) (No. 89-459)	*passim*
ALPA v. *Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir. 1986)	12
Andrews v. *Louisville & Nashville RR Co.*, 406 U.S. 320 (1972)	8
Brotherhood of Locomotive Engineers v. *Louisville Nashville RR Co.*, 373 U.S. 33 (1963)	8
Brotherhood of RY Clerks v. *United Airlines, Inc.*, 325 F.2d 576 (6th Cir. 1963)	12
Elgin, J & E Ry v. *Burley*, 325 U.S. 711 (1945)	7-8
General Committee BLE v. *Missouri-K-T R. Co.*, 320 U.S. 323 (1943)	10
Int'l Brotherhood of Teamsters v. *Texas Int'l Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983)	12
IUFA v. *Pan Am*, 836 F.2 130 (2d Cir. 1988)	*passim*
Order of Railway Conductors v. *Pitney*, 326 U.S. 561 (1946)	8, 10
Slocum v. *Delaware L. & W.R. Co.*, 339 U.S. 239 (1950)	8,10
Switchmen's Union of N.A. v. *NMB*, 320 U.S. 297 (1943)	10
T.-C. E. Union v. *Union Pacific R.R. Co.*, 385 U.S. 157 (1966)	*passim*
Walker v. *Southern Ry Co.*, 385 U.S. 196 (1966)	8

PAGE

Western Airlines v. *Int'l Brotherhood of Teamsters*, 480 U.S. 1301 (1987) 12

Administrative Decisions

Republic Airlines, 8 NMB 49 (1980) 11

Delta Airlines, 14 NMB 291 (1987) 19

Statutes

Railway Labor Act:

28 U.S.C. §1254 (1) 2
§1a(5), 45 U.S.C. §151(a)(5) 2, 7
§2 First, 45 U.S.C. §152 First 2, 7
§2 Ninth, 45 U.S.C. §152 Ninth 2, 9
§3 First (i), 45 U.S.C. §153 First (i) 2, 8
§3 First (m), 45 U.S.C. §153 First (m) 2, 8
§184, 45 U.S.C. §204 ..... 2, 5

IN THE

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No. _____

FLIGHT ENGINEER'S INTERNATIONAL ASSOCIATION, PAA CHAPTER, AFL-CIO,

Petitioner,

v.

PAN AMERICA WORLD AIRWAYS, INC., and PAN AMERICAN CORPORATION,

Respondents.

PETITIONER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Flight Engineers' International Association PAA Chapter, AFL-CIO ("FEIA"),[1] the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on February 13, 1990.

OPINIONS

The opinion of the United States District Court for the Southern District of New York is reported at 716 F.Supp. 110. It is printed in the Appendix hereto at page 7a. The judgment of the District court was affirmed by the Court of Appeals for the Sec-

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[1] Flight Engineers' International Association, PAA Chapter, AFL-CIO, a union, does not do business as a corporation. It is an affiliate of Flight Engineers' International Association, AFL-CIO. It has no subsidiaries, wholly or partially owned.

ond Circuit on February 13, 1990 in an opinion which is printed in the Appendix hereto beginning at page 1a.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was entered on February 13, 1990.

Jurisdiction is conferred on this Court to review the judgment below by 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statute relevant to the issue here presented is the Railway Labor Act ("RLA"), 45 U.S.C. §151 *et seq.* The following provisions of the RLA are relevant to this case: §1a, 45 U.S.C. §151(a); §2 First and §2 Ninth, 45 U.S.C. §152; First and Ninth; §3 First (i) and (m), 45 U.S.C. §153 First (i) and (m); and §204, 45 U.S.C. §184. These provisions are set forth as Appendix H, 39a-42a.

STATEMENT OF THE CASE

The dispute herein has its genesis in the series of concessionary collective bargaining agreements which defendant Pan American World Airways, Inc. ("PAWA") has negotiated with its labor unions—including plaintiff Flight Engineers' International Association, PAA Chapter ("FEIA")[2] in order to deal with its perennial and well-publicized financial difficulties.

Prior to its 1986 agreement with PAWA, FEIA's collective bargaining agreements for its OTIs were agreements only with PAWA. In those agreements, concessions were made in order to assure the continued existence of PAWA as a viable provider of

[2] FEIA, at all relevant times has represented the NMB certified collective bargaining unit of Operations Training Instructors ("OTIs") whose rights are at stake herein. It also represented and continues to represent, under a separate certification, PAWA's flight engineers.

work to the OTI bargaining unit, and the OTI's right to a share of that work as defined by Article 1(B) of the agreement (20a-22a). That provision very precisely delineates what instructional work must be performed "exclusively" by OTIs; what kind of work may be shared with others, and under what circumstances; and what kind of work is to be performed by what categories of OTIs.

The 1986-1988 OTI agreement with PAWA again contained concessions by the OTIs (35a). One of the inducements for the OTIs to sign the agreement in spite of these concessions was the fact that the agreement bound not only PAWA but its parent company, Pan American Corporation ("Pan Am Corp."). Article U of the collective bargaining agreement was a letter agreement, signed by FEIA, PAWA and Pan Am Corp., whereby Pan Am Corp. agreed that:

> "it or any successor to it will be bound by Article 1 of the collective bargaining agreement of the Pan American World Airways-FEIA collective bargaining agreement covering Operations Training Instructors in the same manner as if references to Pan American World Airways, Inc. in Article 1 read Pan American Corporation." (27a).

This agreement by Pan Am Corp. provided to the OTIs making the concessions embodied in the 1986 collective bargaining agreement, important rights: first, it guaranteed that Pan Am Corp., through its subsidiaries, would not attempt to assign PAWA work which should be assigned to PAWA OTIs under the collective bargaining agreement, to employees of other subsidiaries; and, second, it provided that new work acquired by Pan Am Corp. by corporate acquisitions would be assigned to PAWA OTIs, thus providing a lift to the health of a bargaining unit whose long run health was threatened by the decline of flight engineers in the PAWA work force[3] (34a-35a).

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[3] New aircraft such as B-767s, do not require the presence of a flight engineer (i.e., a "second officer") in the cockpit, a large amount of the OTI's work consists of training flight engineers (35a).

The letter agreement thus provided contractual guarantees that, even as concessions distasteful to the FEIA and the OTIs were made in order to secure PAWA's health, the OTIs and FEIA would share in the economic benefits accruing to PAWA and Pan Am Corp. as a result of these concessions by being assigned work of the type OTIs did "exclusively" for PAWA if and when such work were done for other Pan Am subsidiaries. This letter agreement was considered significant by the Union in signing the 1986 Agreement in spite of the concessions contained in it (35a).

The dispute herein was generated by FEIA's attempt to hold PAWA and Pan Am Corp. to the bargain set forth in the Appendix "U" letter of agreement.

The occasion for the dispute was the acquisition by Pan Am Corp. of a regional airline, Ransome Airlines, Inc. ("Ransome"). Pan Am Corp., following the acquisition, did not merge Ransome into PAWA; instead, it decided to operate it as a distinct subsidiary, and changed its name to Pan American Express, Inc. ("Pan Am Express") (37a).

Pan Am Corp. did not reassign Ransome/Pan Am Express work of the kind defined by Article 1(B) as "exclusively" OTI work to PAWA's OTIs. Instead, it assigned it to a miscellaneous group of its own employees (37a).

The initial FEIA grievance generated by Pan Am Corp.'s failure to reassign the instructional work in question to PAWA OTIs was filed on August 7, 1986. In the grievance, FEIA sought both an order to reassign Ransome work in accord with the provisions of Article 1, and damages for noncompliance with Article 1 (30a).

Following the decision of the Second Circuit in *IUFA* v. *Pan American*, 836 F.2d 130 (2d Cir. 1988) *aff'g* 664 F.Supp. 156 (S.D.N.Y. 1987), FEIA amended its grievance. The amended grievance, filed on June 7, 1988, focused explicitly on the violation

of Article 1(B) entailed in Pan Am Corp.'s failure to reassign Ransome/Pan Am Express instructional work to PAWA's OTIs; and sought only damages to compensate the OTIs for the violation of Article 1(B) by defendants (31a-32a).

Defendants refused to submit the amended grievance for resolution by a Board of Adjustment acting pursuant to the collective bargaining agreement and §204 of the RLA, 45 U.S.C. §184.[4] The Amended Complaint herein sought an order compelling resolution of the dispute by a Five Man Board of Adjustment. The District Court's jurisdiction over the complaint was based on 28 U.S.C. §§1331 and 1337, and the RLA, 45 U.S.C. §§151-188, and was undisputed.

ARGUMENT

Introduction: the Need to Grant this Petition

The issue presented by this case is one that is critical for labor relations in the airline industry in an era of merger and acquisitions in that industry. It presents starkly the question of whether an airline union may make an enforceable bargain with an airline and its corporate parent over the fate of work that may come to be controlled by them in the future as a result of future acquisitions.

Under the doctrine enunciated by the court below, such bargains, however solemnly and consciously arrived at by all parties, may in effect be voided in their entirety by a carrier on the grounds that a Board of Adjustment, in the course of deciding the question of whether an alleged breach of the collective bargaining agreement led to compensable damages, might also touch upon "representation issues" ordinarily dealt with by the National Mediation Board ("NMB") in the course of deciding "representation

[4] The defendants had previously refused to submit the initial grievance herein to a Board of Adjustment, which resulted in the first complaint.

questions," and that the Board of Adjustment would thus be intruding upon the "exclusive jurisdiction" of the NMB.

The theory advanced by the Second Circuit in so holding was explicitly rejected by the D.C. Circuit in *AFA* v. *Delta Airlines, Inc.*, 879 F.2d 906 (D.C. Cir. 1989) *petition for cert. filed*, 58 U.S.L.W. 3242 (U.S. Sept. 15, 1989) (No. 89-459). The court in that case, emphasizing the undesirability of rendering lawful bargains unenforceable, 879 F.2d at 915, as well as the dubious nature of any theory granting to a tribunal such as the NMB "exclusive jurisdiction over an issue, as opposed to a type of claim or a remedy," *id.*, held that a violation of a collective bargaining agreement provision regarding successorship could be enforced, even after a complete merger, by a pre-merger collective bargaining representative, by means of a claim for damages.

In rendering its decision, the Second Circuit noted that its own decision in a prior case prevented it from following the holding of the D.C. Circuit (6a).[5]

In arriving at a contrary holding on the same issue, the D.C. Circuit held that the NMB's "exclusive jurisdiction" extends only to disputes over representative certification, and does not vest in it exclusive jurisdiction over issues that it might pass upon in the course of resolving such disputes, 879 F.2d at 915; further, it held that even in the case of a full merger, a subsequent claim for damages by a pre-merger bargaining representative may be presented for resolution to a Board of Adjustment.

The need to resolve the major issue at stake both here and in *AFA* v. *Delta* should be clear.

First, the conflict between the Circuits renders the question of the arbitrability of similar disputes entirely dependent on races to the courthouse door; however rational or irrational our na-

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[5] We show below that the secondary reason suggested by the Second Circuit for not applying *APA* v. *Delta* to the facts presented here cannot withstand even a brief analysis (*see* below, at pp. 18-21).

tional policy toward airline mergers and acquisitions has been since deregulation, it can hardly be rational to permit the question of the viability of a possible major merger or acquisition to be determined by whether a union reaches the Clerk's office with its papers in Washington, D.C. prior to an airline reaching the Clerk's office in New York.

Second, uncertainty of enforcement renders uncertain the possible range of collective bargaining between unions and airlines. Here, for instance, a collective bargaining agreement between the union and the airline was concluded precisely because the airline made the promise which the Second Circuit has permitted it to void: the room for such bargains is eliminated by uncertainty over their enforceability almost to the degree that it would be eliminated by affirmation of the judgment below.

A. THE RAILWAY LABOR ACT REQUIRES THAT DISPUTES ARISING FROM COLLECTIVE BARGAINING AGREEMENTS, INCLUDING WORK ASSIGNMENT DISPUTES, BE SUBMITTED TO BOARDS OF ADJUSTMENT

§2, First of the RLA, 45 U.S.C. §152, First, states:

> "It shall be the duty of all carriers . . . to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions."

§1a(5) of the RLA, 45 U.S.C. §151(a)(5) speaks in general terms to the "maintenance" of agreements, providing that it is a purpose of the RLA:

> "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions."

Such disputes have been termed "minor disputes" by this Court, *see Elgin, J & E Ry* v. *Burley*, 325 U.S. 711 (1945), and must

be resolved by an appropriately established Board of Adjustment, *see* 45 U.S.C. §153, First (i) and 45 U.S.C. §184, whose awards are final and binding, 45 U.S.C. §153, First (m). It has been well established by the decisions of this Court that these procedures specified by the Act are mandatory and exclusive, *see Andrews* v. *Louisville & Nashville RR Co.*, 406 U.S. 320 (1972); *Walker* v. *Southern Ry Co.*, 385 U.S. 196 (1966); and *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville RR Co.*, 373 U.S. 33, 38 (1963).

Nor has this Court withheld from jurisdiction of Boards of Adjustment disputes over whether a carrier's work assignment practices violated a collective bargaining agreement, despite the fact that such disputes might as easily be logically said to involve a dispute over who was to represent employees doing a certain kind of work, *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561 (1946); *Slocum* v. *Delaware L. & W.R. Co.*, 339 U.S. 239 (1950); *T.-C. E. Union* v. *Union Pacific R.R. Co.*, 385 U.S. 157 (1966). Indeed, in *T.-C. E. Union*, the Court went so far as to hold that the Adjustment Board had not only the jurisdiction, but the "duty" to completely resolve a dispute between two certified unions, each with claims arising from its collective bargaining agreement, as to which was entitled to be assigned a new job which had come into existence since the conclusion of the agreements, *id.* at 161-2. "The railroad, the employees, and the public, for all of whose benefits the Railway Labor Act was written, are entitled to have a fair, expeditious hearing to settle disputes of this nature. And we have said in no uncertain language that the Adjustment Board has jurisdiction to do so." *T.-C. E. Union, supra* at 162.

It should be clear without argument that the grievance herein grows out of "interpretation or application" of a collective bargaining agreement: it is the simple contention of FEIA that Article 1(B) of the agreement obliged Pan Am Corp. to reassign certain work being done by Ransome/Pan Am Express to PAWA's OTIs; and that failure to do so damaged OTI's who

should be compensated for the damages in an amount to be determined by the Board of Adjustment. Plainly considered on its own terms, the dispute was a minor one which had to be resolved by arbitration.

By precluding the Adjustment Board from thus resolving this dispute, the Second Circuit has invaded and foreshortened the jurisdiction of the Adjustment Board as defined by §3 of the RLA; we show below that it did so in spite of the fact that there was no need to in order to protect the jurisdiction of the NMB.

B. THE CLAIM OF THE UNION HEREIN IS NOT WITHIN THE EXCLUSIVE JURISDICTION OF THE NATIONAL MEDIATION BOARD

1. Definition of the Role of the NMB in Representation Disputes

The role of the National Mediation Board in disputes concerning representation of employees is set forth in §2, Ninth of the RLA, 45 U.S.C. §152, Ninth:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. . . ."

The question of the "exclusive jurisdiction" of the National Mediation Board to resolve "any dispute . . . as to who are the representatives of such employees designated and authorized in

accordance with the requirements of this Act" (i.e., what have been termed traditional "representation disputes" *see* e.g., decision below, 4a) was first considered by the Supreme Court in *Switchmen's Union of N.A.* v. *NMB*, 320 U.S. 297 (1943), and *General Committee BLE* v. *Missouri-K-T R. Co.*, 320 U.S. 323 (1943).

The District of Columbia Circuit in *Flight Attendants* v. *Delta Airlines, supra* at 912, has summarized the significance of these cases as follows:

> "*Switchmen's Union* and *M-K-T* lay down several principles relevant to the present dispute. First, the Court made it perfectly clear in both cases that only the NMB may certify an employee representative. Second, the Court in *Switchmen's Union* suggested that the scope of the NMB's power under §2, Ninth, is narrowly limited to determining the representative and issuing its certificate. Finally, the Court's analysis in *M-K-T* strongly suggests that if a dispute is not governed by §2, Ninth it is not precluded, but rather may be pursued through the voluntary processes, such as arbitration, that Congress made the norm." 879 F.2d at 912.

The limits of the doctrine of NMB "exclusive" jurisdiction were further clarified by the Supreme Court in a series of cases whereby the court made clear that, within the framework provided by initial NMB certification, work assignment disputes between certified unions could and should be resolved by Adjustment Boards as minor disputes, *see Order of Railway Conductors* v. *Pitney*, 326 U.S. 561 (1946); *Slocum* v. *Delaware L. & W.R. Co.*, 339 U.S. 239 (1950); *T.-C. E. Union* v. *Union Pacific R. Co.*, 385 U.S. 157 (1966), discussed above. The question of determining whether work should be assigned to a craft represented by one carrier union or another clearly involves in some way a dispute over who will represent employees doing work of that description; and yet, because contractual rights are also involved, "we have said in no uncertain language that the Adjustment

Board has jurisdiction to do so." *T.-C. E. Union* v. *Union Pacific R. Co.*, *supra* at 162.

The proper limits of the doctrine of NMB "exclusive" jurisdiction are suggested by these early Supreme Court cases. Exclusive NMB jurisdiction exists only if and when there is a dispute over issuance of, or extinction of, an NMB certification; it does not preclude an Adjustment Board from deciding to which union's jurisdiction newly created work should be assigned; nor does it exist where a union's grievance does not demand representation rights (or their equivalent), but only seeks damages for a carrier's failure to comply with a contractual work assignment obligation.

The doctrine of the exclusive jurisdiction of the NMB to determine representation disputes in merger situations, a doctrine developed by various Courts of Appeals, plainly emerges from and does not subvert the limiting principles long established by this Court. What distinguishes a full operational merger from a work assignment dispute between a carrier's unions is precisely the fact that, once a merger takes place, the representation certification of any union representing only a minority of the merged carrier's employees is extinguished by operation of law, *Republic Airlines*, 8 NMB 49, 54-55 (1980). An attempt by a representative of a minority of the employees to require compliance with the recognition and scope rights it enjoyed with a pre-merger carrier would threaten to determine the only question legitimately within the exclusive jurisdiction of the NMB, i.e., who should be certified to represent the employees of the new merged carrier. The cases which have developed the doctrine of the "exclusive jurisdiction" of the NMB to determine representation rights in merger situations have all—until this case[6]—been based upon this need to prevent a Board of Adjustment from determining a certification

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[6] We may include, as well, the Second Circuit's decision in *IUFA* v. *Pan Am*, 836 F.2d 130 (2d Cir. 1988) discussed below at p.13, n.9, which involved a dispute over specific performance of a work assignment obligation by the carrier; as here, no operational merger was involved.

question contrary to the policies of the NMB, *see* e.g., *ALPA* v. *Republic Airlines, Inc.*, 798 F.2d 967, 968-9 (7th Cir. 1986); *Brotherhood of Ry Clerks* v. *United Airlines, Inc.*, 325 F.2d 576, 578-9 (6th Cir. 1963); *Int'l Brotherhood of Teamsters* v. *Texas Int'l Airlines, Inc.*, 717 F.2d 157, 159 (5th Cir. 1983)[7] *See also* discussion of these and similar cases in *AFA* v. *Delta Airlines, supra* at 912.[8]

The logic of the Second Circuit in reaching the decision below is neither required nor justified by the line of cases establishing the NMB's exclusive role in post-merger disputes over representation; nor can it be squared with this Court's decisions over the jurisdiction of Boards of Adjustment in work assignment disputes.

2. The Doctrine of the Exclusive Jurisdiction of the NMB to Consider Certain "Representational Issues"

The Court's primary reason for precluding the Board of Adjustment from deciding the merits of the Union's contractual grievance is that, although not a traditional dispute over representation, the grievance "implicated representation concerns within the exclusive jurisdiction of the NMB . . ." (4a). In explicating that conclusory language, the Second Circuit states that the

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[7] "Enforcement of the contract, therefore inescapably entailed the continuance of the Union's role as employee representative for the minority group, in accordance with its 1980 certification. Continuation of the contract in force unavoidably constitutes a determination of employee representation . . .", *Int'l Bro. of Teamsters* v. *Texas Int'l Air*, 717 F.2d 157, 161 (5th Cir. 1983).

[8] "The merger of Delta and Western airlines, which has given rise to such a tangle of litigation, including *AFA* v. *Delta Airlines, supra*, also involved the complete operational merger of two airlines with the inevitable question of "the continuance of the Union's role as employee representative for the minority group," cf. *IBT* v. *Texas International Air, supra*. It was in this context that Justice O'Connor, sitting as Circuit Justice, made her often quoted remark that

> "the great weight of the case law supports the proposition that disputes as to the effect of collective bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board."

Western Airlines v. *Int'l Brotherhood of Teamsters*, 480 U.S. 1301 (O'Connor, Circuit Justice 1987).

representation concerns "implicated" are "whether the union's certification applied to subsequently acquired Ransome subsidiary and whether the two related airlines should be treated as a single carrier for representation purposes." Although the Court itself did not at all explain the ambiguous "implicate," it would appear that the Court's concern was that in passing upon the merits of the Union's grievance, the Board of Adjustment would be required to (or at least might) pass upon these stated "representation concerns."

There are two responses to this.

First, in point of fact, the Union's grievance here simply does not give to the Board of Adjustment the occasion to address any "representation concerns," including the specific "concerns" the Court cited. The grievance cites specific contractual language by which—in the Union's view—Pan Am Corp. had obligated itself to assign work of a certain specific description to OTIs in the bargaining unit. Thus, the grievance simply called upon the Board to decide whether Pan Am Corp. had in the past in fact lived up to this obligation. This question can plainly be determined by doing no more than looking to see whether Ransome/Pan Am Express work has in fact been assigned in the past to PAWA OTIs. The question is a simple matter of fact regarding past work assignments: if the work has not been assigned to PAWA OTIs, defendants violated their contractual obligations, regardless of certification and single carrier questions. The sole issue remaining would then be whether money damages should be ordered, and if so, how to measure the damages—again, questions with no conceivable relationship to certification or the single carrier question.[9]

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[9] It is in respect to these considerations that the case at hand is distinguishable from the Second Circuit's prior decision in *IUFA v. Pan Am*, 836 F.2d 130 (2d Cir. 1988) (*per curiam*), *affirming* 664 F. Supp. 156 (SDNY 1987). In the prior case, the union sought—*inter alia*—an order from the Board of Adjustment ordering Pan Am Corp. to cause Pan Am Express to change its work assignment

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The second, and far more fundamental response, is that there is no warrant in sound judicial policy or precedent for the Second Circuit's theory that consideration of a "representation concern" or "issue" by any tribunal other than the NMB is prohibited by the doctrine of exclusive NMB jurisdiction. This view was precisely that advanced by Delta in *AFA* v. *Delta*, and was rejected by the D.C. Circuit in convincing fashion:

> Second, we question whether (at least in the absence of a clear statutory allocation of competence) any adjudicatory tribunal can have exclusive jurisdiction over an issue, as opposed to a type of claim or a remedy. Virtually any issue may arise in a variety of different contexts. As a general rule, whether a case is within the exclusive jurisdiction of an expert tribunal depends upon the nature not of the issues that may have to be decided, but of the substantive cause of action. (citations and discussion of cases omitted). 879 F.2d at 915.

This Court has in the past required Boards of Adjustment to pass on representation issues in resolving the contractually based claims of different unions regarding which class of employees was entitled to do newly created work, *see* e.g., *T.-C. E. Union* v. *Union Pacific R.R. Co.*, *supra* and cases cited above at p.8. That case

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policies so as to conform with the collective bargaining agreement. Such an order would indeed require resolution of the "representation concerns" cited by the Court, i.e., compliance with the collective bargaining agreement for the future could have been achieved either by ordering the work reassigned to the existing PAWA flight attendants; or by finding that Pan Am Express flight attendants should be deemed covered by the collective bargaining agreement (either by virtue of the IUFA certification or by a single carrier theory). Deciding which remedy to order would require a Board of Adjustment to decide the "representation concerns." Here, in contrast, where the Board of Adjustment is being asked only for a money remedy for past conduct, there is no reason for the Board to even consider these concerns.

This distinction is meaningful only in the event that one accepts the Second Circuit's general view of exclusive NMB jurisdiction over certain issues (as opposed to disputes or remedies), a view whose total rejection we urge below.

makes it clear that the expertise of the NMB in deciding class or craft issues is not such as precludes a Board of Adjustment from passing on such questions, thus supporting the view of the D.C. Circuit that while the NMB has "exclusive jurisdiction" over disputes over the extinction or revival of certifications, it does not have "exclusive jurisdiction" over representation *issues*. We therefore urge this Court to reject the Second Circuit's view on this question, and adopt the D.C. Circuit's more nuanced and well reasoned approach.

3. Practical Effect of Damages Award

The Second Circuit also relied on the practical effect of permitting an Adjustment Board to determine the Union's contractual claim for damages:

> ". . . an award of the damages sought here—or even a realistic threat of such an award—would have the same practical effect as work reassignment on settling representation issues by extinguishing the possibility of a separate Ransome bargaining unit. No company in its right mind would continue to pay twice for the same work; it would take steps to transfer the work, if it could." (5a).

It is true that the possible cost of a damages award[10] would be an element taken into consideration by Pan Am in deciding who to whom to assign the work. But considerations of cost in determining work assignments are hardly illegal. If Pan Am Corp. had a contract with a private flight academy to purchase from it all of the training requirements of it and its subsidiaries,

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[10] The Court clearly erred in assuming that a damages award would necessarily require the company "to pay twice for the same work." The measure of damages for the work assignment violation of contract is a matter for the Board of Adjustment regarding which the Court's assertion is at best speculation: the Board of Adjustment might well take into account in determining an appropriate measure of damages such factors as whether identifiable individuals were hurt by the policy; how much the company saved by paying Ransome rates rather than PAWA rates for the work; and how much of value the OTIs gave up in contract negotiations in order to secure the provision which defendants violated.

the threat of court action to enforce this obligation would obviously affect its work assignment policy; yet one can hardly imagine any court dismissing such an action as within the "exclusive jurisdiction" of the NMB.

Indeed, the Company had every right to decide on its own to transfer the training work in question from Ransome employees to PAWA OTIs, as it doubtless would have done had the cost factors favored the transfer. Plainly, the unique role of the NMB would not have been relevant to any attempt to prevent such a transfer.

What the Second Circuit has thus ruled is that a company in Pan Am Corp.'s position may take into consideration in making a work assignment decision every cost factor *except* the cost of complying with its collective bargaining agreement. The inappropriateness of—in effect—nullifying contractual rights simply because they cost money and hence may be taken into consideration in making a work assignment decision should be apparent; indeed, the D.C. Circuit in *AFA* v. *Delta* emphasized the irrelevance of the cost to the carrier of complying with a damages award, and its impact on merger decisions, to the question of whether a Board of Adjustment could hear the claim, *AFA* v. *Delta, supra* at 917.

4. Effect of the Decision Below: Voiding a Lawful Contractual Provision

The facts here establish that the agreement between Pan Am Corp. and FEIA to assign to OTIs specific training work that might be performed in the future for future subsidiary acquisitions of Pan Am Corp. was a vital part of the 1985 collective bargaining agreement; it was, in effect, a promise by Pan Am Corp. that, in exchange for current concessions to lower the costs of PAWA training, OTIs would receive the added job security represented by a guaranteed role in training the personnel of future subsidiaries. Absent agreement on the provision, the possibility

that a collective bargaining agreement could have been successfully negotiated is entirely speculative.

At no point in these proceedings has anyone suggested that such an agreement is illegal. Pan Am's power to effect the work transfer unilaterally, because of cost considerations, is unquestioned; nor does anything in any statute or in decisions of this or any other court indicate that the lawfulness of such a decision is tainted by its being undertaken in order to take into account the costs of compliance with a collective bargaining agreement.[11] On the contrary, as the Second Circuit conceded, the provisions of the Railway Labor Act explicitly emphasize the critical importance of the carrier's duty to "make and maintain agreements." Any decision that voids a substantively lawful provision of such an agreement not only assists a carrier in avoiding its duty to "maintain" agreements; it also subverts the possibility of making future agreements in difficult circumstances by rendering voidable an entire category of subjects resolutions of which may make the difference between an agreement and a strike. "Due respect for privately bargained outcomes cautions against that result, unless some important public policy would otherwise be compromised." *AFA* v. *Delta*, *supra* at 916.

Nor does the Second Circuit respond to these concerns, or cite "an important public policy" by opining that, in a "merger" situation the NMB must first be permitted to define representation rights before working conditions are established or interpreted (5a-6a).

This position can have one of two meanings. First, it can mean that the gesture of presenting representation claims to the NMB must be engaged in even where—as here—the claims are not being made and cannot be justified, and that thereafter, hav-

[11] Such costs—i.e., OTI pay rates—were obviously taken into consideration in the decision to assign the work to Ransome; why other costs—i.e., damages—should not also be taken into consideration is hard to discern.

ing had its "claim" predictably rejected, the union can proceed to arbitrate a contractual work assignment claim. We cannot, however, perceive what purpose is to be served by requiring representation claims without merit to be filed with the NMB.

Second, the Court may have meant that failure of a union to prevail with a representation claim means that it cannot present to a Board of Adjustment its contractual claim to the work in question. This meaning at least has the advantage of not requiring meritless claims to be filed with the NMB. However, it has the more serious flaw of nullifying a contractual provision; because it does so without serving any explicit—let alone important—statutory command or policy, it should be rejected by this Court.

5. Comparison of Case at Hand with *AFA* v. *Delta*

In its concluding paragraph, the Second Circuit addressed the impact of the D.C. Circuit's decision in *AFA* v. *Delta* on the case at hand.

The Court's first observation forcefully established the need for this Court to grant certiorari to resolve the basic issue common to both cases: the Court simply declined to follow *AFA* v. *Delta* because ". . . we do not write upon a blank slate in this area, in view of our controlling precedent in *IUFA*" (6a).

The Court then attempted to distinguish *AFA* v. *Delta* on the grounds that:

> ". . . by the time of the D.C. Circuit's *Delta* decision, the merger had been consummated and the NMB had retroactively extinguished the union's certification (since that union then represented only a minority of the relevant class of employees); thus, in view of the NMB's conclusive determination of the representation issue, a court order compelling arbitration of the damages claim would not interfere with the NMB's exclusive jurisdiction." (6a)

There are several glaring flaws in the Court's reasoning in making this distinction.

First, an NMB determination of a "representation question" can arise only if there is a serious question to present to the NMB; here, there is no such question. The decision by Pan Am Corp. not to merge Ransome/Pan Am Express with PAWA, but rather to operate it as an operationally separate subsidiary made it plain to FEIA that the fact of the acquisition would in no way affect representation rights at either Pan Am Corp. subsidiary under NMB law: those unions certified at PAWA to represent certain classes and crafts would continue to do so; and those who attained such certification at Ransome/Pan Am Express as a result of organizing activity unrelated to their legal status at PAWA would enjoy those rights without any reference to the question of who represented an analogous class or craft at PAWA. *See* e.g., the Second Circuit's comments in *IUFA* v. *Pan American*, *supra* at 131. Had there been even the remotest chance for FEIA to obtain an NMB ruling that PAWA and Ransome had been merged into a single carrier, FEIA would obviously have initiated such an NMB proceeding to obtain such a ruling, since the vastly larger size of PAWA would have extended PAWA certifications to Ransome. However, the decision of Pan Am Corp. not to effect any merger doomed such a proceeding from the beginning. It should be axiomatic that the law not only does not require, but discourages the filing of futile and frivolous actions and petitions: to require a union to file a frivolous representation petition as a condition precedent for vindicating valid contractual rights is simply not a reasonable position.

Second, the result of NMB action (initiated by *Delta*) in *In re Delta Airlines Inc. & Western Airlines Inc.*, 14 NMB 291 (1987) shows clearly that FEIA's right to pursue its damages claim here is—if anything—stronger than AFA's right in its case. For, by that proceeding, the NMB extinguished all AFA representation rights retroactive to the effective date of the merger. Thus, in per-

mitting the AFA damages claim to go ahead, the D.C. Circuit was permitting that union to proceed with a claim in spite of the fact that it no longer represented any of the employees involved, and in spite of the fact that the airline against whom it was proceeding—Delta—was a carrier whose employees it had never represented and with whom it had no contractual relationship. In contrast, here FEIA's continued right to represent PAWA OTIs is unquestioned by anyone; and the continued validity of its contractual relations with both PAWA and Pan Am Corp. is similarly unquestioned. Indeed, the entire point of the Union's grievance here is that it has a right to enforce contractual work assignment commitments to it by those defendants regardless of the fact that the work would be taken from employees of an unrelated Pan Am Corp. subsidiary whose employees FEIA concedes that it does not represent.

It should be clear that the underlying work assignment dispute here is one that could be directly resolved by a Board of Adjustment under the standards of *AFA* v. *Delta*. The reassignment of work can be ordered, in the context of an acquisition without a merger, without in any way interfering with NMB certification determinations; merely to remove some work from one carrier's employees does not determine who those employees representative must be.[12] Although that issue itself is not raised for decision by the facts here, a consideration of it under the reasoning of *AFA* v.

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[12] Even a specific order of work reassignment would—like the damages claim in *AFA* v. *Delta*—lack the "untoward results" of permitting a Board of Adjustment to consider a representation claim: no policy of the revocation of a minority certificate would be affected; the acquisition would not be undone; the collective bargaining agreement would not be extended beyond its prior reach; employees in one craft would not be subject to different sets of working conditions; nor, in general, would there be any effect on any NMB certification of representatives at Ransome (*compare* 879 F.2d at 913).

To the extent that Ransome/Pan Am Express unions themselves developed a contractual claim to the work in question, the dispute between the unions could and should be resolved by a Board of Adjustment hearing all claims as per *T.-C.E. Union Pacific*, *supra*, not by the NMB.

Delta does emphasize the fact that the factors in favor of permitting the union's damages claim to proceed here are even stronger than in *AFA* v. *Delta*; where the underlying work assignment itself might be dealt with by a specific performance order without interfering with the NMB's exclusive jurisdiction, then the derivative claim for damages clearly presents no possibility of interference with matters within the NMB's exclusive jurisdiction.

It should be clear from the above discussion that the Second Circuit erred fundamentally by failing to analyze the difference between an acquisition followed by an operational merger, and one where the independence and operational identity of a new acquisition is retained: the operational merger does give rise to representational questions which require that certain claims—not including claims for damages—be reserved for the NMB; the simple acquisition in contrast, which does not give rise to representational claims, does give rise to work claims which, where they conflict, can and must be resolved by a Board of Adjustment. *T.-C. E. Union* v. *Union Pacific R.R. Co.*, *supra*.

CONCLUSION

The holdings of the D.C. Circuit and the Second Circuit on the central issue raised both here and in *AFA* v. *Delta* cannot be reconciled. Certiorari should be granted here so that this Court may fully determine the limits of the doctrine of exclusive NMB jurisdiction in merger and acquisition situations. Absent such a determination, not only will key questions regarding employee and carrier rights in similar situations be determined by forum shopping; but the ability of unions at all airlines to negotiate enforceable agreements about how to handle possible future mergers and acquisitions will be placed in doubt, with a consequent impact on all collective bargaining in the industry.

For the above reasons, FEIA's petition for a writ of certiorari should be granted.

Respectfully submitted,
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March 21, 1990

APPENDICES

APPENDIX A

Opinion of

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 701—August Term 1989

Argued: January 18, 1990 Decided: February 13, 1990

Docket No. 89-7911

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, PAA CHAPTER, AFL-CIO,

Plaintiff-Appellant,

—against—

PAN AMERICAN WORLD AIRWAYS, INC., and PAN AMERICAN CORPORATION,

Defendants-Appellees.

BEFORE:

FEINBERG, PRATT and MAHONEY,

Circuit Judges.

Appeal from judgment of United States District Court for the Southern District of New York, Peter K. Leisure, J. granting motion of defendants-appellees Pan American World Airways,

Inc. and Pan American Corporation to dismiss complaint of plaintiff-appellant union, which sought an order compelling arbitration, for the lack of subject matter jurisdiction.

Affirmed.

DAVID B. ROSEN, New York, NY (O'Donnell & Schwartz, of Counsel), *for Plaintiff-Appellant.*

RICHARD SCHOOLMAN, New York, NY (Eikenberry Futterman & Herbert, of Counsel, *for Defendants-Appellees.*

FEINBERG, *Circuit Judge:*

Plaintiff-appellant Flight Engineers' International Association (FEIA) appeals from a judgment of the United States District Court for the Southern District of New York, Peter K. Leisure, J., granting the motion of defendants-appellees Pan American Corporation (Pan Am Corp.) and Pan American World Airways, Inc. (PAWA) to dismiss the amended complaint for lack of subject matter jurisdiction. Pan Am Corp. is a holding company and is not an airline; PAWA is its wholly owned airline subsidiary. The amended complaint charged that Pan Am Corp. and PAWA violated section 204 of the Railway Labor Act (the Act), 45 U.S.C. § 184, and the parties' collective bargaining agreement (the Agreement) by refusing to arbitrate what FEIA characterized as a contractual dispute arising under Article 1(B) of the Agreement. Article 1(B), known as a scope clause, requires PAWA to use exclusively FEIA-represented Operations Training Instructors (OIT's) employed by PAWA to perform instructional work in designated areas involving the training of flight engineers, flight personnel and maintenance personnel. By a letter agreement dated February 19, 1986, Pan Am Corp. agreed that it, or any successor, would be bound by Article 1 of the Agreement.

Appendix A

In April 1986, Pan Am Corp. acquired a small regional airline, Ransome Airlines, Inc. (Ransome), which was later renamed Pan Am Express, Inc. After becoming a wholly owned subsidiary of Pan Am Corp., Ransome continued to use its own employees as training personnel, rather than the OTI's employed by PAWA and represented by FEIA. None of the approximately 16 Ransome training personnel is represented by FEIA; some are represented by other unions and some are not represented by any union.

In August 1986, FEIA filed a grievance, alleging that Pan Am Corp. had violated Article 1 of the Agreement "by the failure of its subsidiary, Ransome Airlines to employ OTI's in accord with the Agreement." Pursuant to the Agreement, FEIA sought to have its grievance referred to a Board of Adjustment for arbitration and requested as relief both the assignment of work to the OTI's and backpay for all OTI's damaged by the contractual violation. Pan Am Corp. and PAWA took the position that the grievance involved a representation issue within the exclusive jurisdiction of the National Mediation Board (NMB), and refused to submit to arbitration unless required to by a court of competent jurisdiction. In September 1987, FEIA instituted this action.

In January 1988, this court decided in defendants' favor another case involving similar issues raised by another union arising out of the same acquisition of Ransome by Pan Am Corp. Independent Union of Flight Attendants (IUFA) v. Pan American World Airways, Inc., 836 F.2d 130 (2d Cir. 1988) (per curiam), aff'g 664 F. Supp. 156 (S.D.N.Y. 1987). Thereafter, FEIA amended its grievance to eliminate any claim to work reassignment but continued to seek damages. Defendants maintained their refusal to submit the dispute to a Board of Adjustment.

In an opinion filed in July 1989, and reported at 716 F. Supp. 110, Judge Leisure dismissed the complaint for lack of subject matter jurisdiction. The judge held that the dispute implicated representation issues within the exclusive jurisdiction of the NMB

pursuant to §2 Ninth of the Act, 45 U.S.C. §152 Ninth, and that resolution by a Board of Adjustment acting pursuant to §204 of the Act, 45 U.S.C. §184, and Article 23 of the parties' Agreement was thus precluded, at least in the first instance. The court believed that our recent decision in *IUFA*, mentioned above, controlled the disposition of this case. In *IUFA*, a flight attendants' union sought to compel arbitration of its claim that Pan Am Corp. and PAWA had violated the scope clause of their collective bargaining agreement by failing to employ flight attendants represented by IUFA on Ransome flights. The district court dismissed the complaint for lack of subject matter jurisdiction, and we affirmed.

On appeal, FEIA continues to argue, as it did in the district court, that this case is distinguishable from *IUFA* because FEIA seeks only a retroactive award of damages resulting from defendants' noncompliance with a scope clause and not, as the union sought in *IUFA*, a prospective order reassigning work to members of its bargaining unit. FEIA contends that a claim for damages, unlike a claim for work reassignment, does not involve the resolution of representation issues since it calls for only a factual determination under the FEIA Agreement of whether the individuals who received the challenged work were OTI's working under the Agreement.

We disagree. As the district court correctly noted, although this case may not present "a traditional dispute over representation," 716 F. Supp. at 115, it presents the same factors which, for the *IUFA* court, had implicated representation concerns within the exclusive jurisdiction of the NMB, i.e., whether the union's certification applied to the subsequently acquired Ransome subsidiary and whether the two related airlines should be treated as a single carrier for representation purposes. See IUFA, 664 F. Supp. at 159; see also Western Airlines, Inc. v. International Brotherhood of Teamsters, 480 U.S. 1301, 1305 (1987) (O'Connor, J., sitting as Circuit Justice) ("The great weight of the case law

supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board."). Moreover, despite FEIA's effort to characterize *IUFA* as only a work reassignment case (concededly within the jurisdiction of the NMB), the union there also sought "make whole" relief, i.e., money damages, as FEIA does here. In addition, an award of the damages sought here—or even a realistic threat of such an award—would have the same practical effect as work reassignment on settling representation issues by extinguishing the possibility of a separate Ransome bargaining unit. No company in its right mind would continue to pay twice for the same work; it would take steps to transfer the work, if it could. Thus, like the district court, we reject FEIA's characterization of the present conflict as involving solely a "minor dispute," that is, a dispute over the interpretation or application of existing collective bargaining agreements, which under § 204 of the Act, 45 U.S.C. § 184, is committed to an authorized Board of Adjustment for resolution.

FEIA also argues that if the dispute is referred to the NMB, the scope clause will be rendered a nullity, since the NMB lacks jurisdiction to enforce the terms of collective bargaining agreements. FEIA maintains that this would deprive OTI's of the fruits of their 1986 bargain with appellees Pan Am Corp. and PAWA and would unjustly secure for appellees the concessions made in exchange for the work assignment agreement. Such a result, FEIA says, would also run counter to the statutory purposes of section 2 First of the Act, 45 U.S.C. §152 First, which imposes on carriers a duty to "make and maintain agreements." We are not persuaded. As the district court pointed out, the NMB "must have the opportunity to define how, and by whom, groups of employees in this airline merger situation are to be represented"; only after the NMB's determination "may the union and the em-

ployer, or their arbitrator, establish or interpret contractual working conditions." 716 F. Supp. at 116.

In short, we would ordinarily stop at this point and affirm for the reasons given by the district court were it not for FEIA's final argument. FEIA asks us to follow the decision of the D.C. Circuit in Association of Flight Attendants v. Delta Air Lines, Inc., 879 F.2d 906 (D.C. Cir. 1989), decided after the district court's opinion in this case. The D.C. Circuit held, in the context of an airline merger, that the district court had jurisdiction to order arbitration of the union's claim for damages against the surviving carrier, which was based on the alleged violation of a successorship clause in the union's contract with the absorbed carrier. Appellant's reliance on the *Delta* decision is inapposite for two reasons. First, as indicated above, we do not write upon a blank slate in this area, in view of our controlling precedent in *IUFA*. Second, by the time of the D.C. Circuit's *Delta* decision, the merger had been consummated and the NMB had retroactively extinguished the union's certification (since that union then represented only a minority of the relevant class of employees); thus, in view of the NMB's conclusive determination of the representation issue, a court order compelling arbitration of the damages claim would not interfere with the NMB's exclusive jurisdiction. Such a conclusive determination of the representation issue, without the interference of the threat of an award, is precisely what is lacking here.

The judgment of the district court is affirmed.

APPENDIX B

Opinion of

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

OPINION AND ORDER

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, PAA CHAPTER, AFL-CIO,

Plaintiff,

v.

PAN AMERICAN WORLD AIRWAYS, INC. and PAN AMERICAN CORPORATION,

Defendants.

No. 87 CIV. 6694 (PKL).

July 5, 1989.

LEISURE, District Judge.

Plaintiff, Flight Engineers' International Association ("FEIA" or the "union"), moves for summary judgment against defendants, Pan American World Airways, Inc. ("PAWA") and Pan American Corporation ("Pan Am Corp."). The complaint charges that the defendants have violated the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and FEIA's collective bargaining agreement by refusing to arbitrate what FEIA describes as a contract dispute. Defendants have cross-moved to dismiss FEIA's complaint for lack of subject matter jurisdiction.

As indicated below, the defendants' motion to dismiss for lack of subject matter jurisdiction is granted. Therefore, the

Court does not reach the plaintiff's motion for summary judgment.

In evaluating a FED.R.Civ.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, a court may consider evidentiary matters presented by affidavit or otherwise, and is not restricted to the face of the pleadings. *Kamen* v. *American Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir.1986). *See also Exchange Nat. Bank of Chicago* v. *Touche Ross & Co.*, 544 F.2d 1126, 1130—31 (2d Cir.1976). Consideration of extraneous materials does not convert a motion under Fed.R.Civ.P. 12(b)(1) into a Fed.R. Civ.P. 56 motion. *Kamen, supra,* 791 F.2d at 1011.

A motion to dismiss under Rule 12 must be denied "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer* v. *Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974) (*citing Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); *Rauch* v. *RCA Corp.*, 861 F.2d 29 (2d Cir.1988); *Morales* v. *New York State Department of Corrections*, 842 F.2d 27, 30 (2d Cir.1988). The Court must accept the pleader's allegations of facts as true, liberally construe those allegations, and make such reasonable inferences as may be drawn in its favor. *Dahlberg* v. *Becker*, 748 F.2d 85, 88 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1845, 85 L.Ed.2d 144 (1985); *Murray* v. *City of Milford, Connecticut*, 380 F.2d 468, 470 (2d Cir.1967). *See also Scheuer, supra*, 416 U.S. at 236, 94 S.Ct. at 1686; *Pross* v. *Katz*, 784 F.2d 455, 457 (2d Cir. 1986). On a motion to dismiss, the Court must "determine whether the facts set forth justify taking jurisdiction on grounds other than those most artistically pleaded." *Yoder* v. *Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555, 558 (2d Cir.1985). The following statement of the relevant facts is based both on the pleadings and the affidavits submitted in connection with the motions, but the determinative question, for present purposes, raises a pure issue of law.

Appendix B

Background

PAWA is an international airline, and a wholly-owned subsidiary of defendant Pan American Corp. FEIA is the exclusive collective bargaining representative of PAWA's Operations Training Instructors ("OTI's"). FEIA obtained its representative status through a certification issued by the National Mediation Board in 1968. *See* Article 1(A) of the Collective Bargaining Agreement (the "Agreement"), attached as Exhibit A to First Amended complaint (the "Complaint").

Article 1(B) of the Agreement contains what is often called a "scope" clause; this agreement's scope clause required PAWA to utilize FEIA-represented OTI's employed by PAWA whenever PAWA performs training of, *inter alia*, pilots, flight attendants, and ground personnel. The Agreement specifically provides that "OTI's by component group, shall exclusively perform the instructional work which is conducted by the Company requiring the services of an Instructor."

In addition to the original Agreement, a letter dated February 19, 1986 was signed by FEIA, PAWA, and Pan Am Corp. and was subsequently appended to the Agreement as Appendix U. That letter stated in relevant part:

> Pan Am Corporation, parent of Pan American World Airways, Inc., agrees that it or any successor to it will be bound by Article I of the Pan American World Airways, Inc.—FEIA collective bargaining agreement covering Operations Training Instructors in the same manner as if references to Pan American World Airways, Inc., in Article I read Pan American Corporation.

In April 1986, after the Agreement was supplemented by the above noted letter, Pan Am Corp. purchased Ransome Airlines, Inc. ("Ransome"), a regional airline. Prior to the acquisition, Ransome had been an independent carrier, unaffiliated with either of the defendants. Subsequent to the acquisition, Ransome

became, like PAWA, a wholly-owned subsidiary of Pan American Corp. In October 1986, Ransome's name was changed to Pan American Express, Inc. ("Pan Am Express").

After being acquired by Pan Am Corp., Ransome continued to utilize its *own* employees, not PAWA-employed/FEIA-represented OTI's, to conduct training for its own pilots, flight attendants, and ground personnel. Of the approximately 16 Ransome employees training other Ransome employees, some are represented by the Independent Union of Flight Attendants, some by the Air Line Pilots Association, and some are un-represented. *See* Affidavit of David C. Reeve, sworn to on December 6, 1988, ¶ 2 -3.

The FEIA took the position that PAWA and Pan Am Corp. violated Article 1(B) of its agreement by failing to utilize FEIA-represented OTI's to train Ransome personnel. FEIA consequently filed its initial grievance and sought to refer the grievance to a five man Board of Adjustment, as provided by Article 23 of the Agreement. As a remedy, FEIA sought the assignment of work to FEIA-represented OTI's, as well as damages. PAWA responded by denying FEIA's grievance, and declined to submit to arbitration by the Board of Adjustment. PAWA stated that it would submit to arbitration by the Board of Adjustment only if compelled to do so by court order. *See* Complaint ¶ 13-15. FEIA, in turn, filed this action.

Following the decision of a similar case, *IUFA* v. *Pan American World Airways, Inc.*, 664 F.Supp. 156 (S.D.N.Y.1987), *aff'd*, 836 F.2d 130 (2d Cir. 1988), decided in PAWA's favor, FEIA amended its grievance. The amended grievance eliminated any claim to the work and sought only the money its PAWA-employed OTI's would have earned if allowed to train Ransome personnel. PAWA stood by its belief that the grievance was not arbitrable, and reiterated its position that it would not arbitrate before the Board of Adjustment, absent a court order to do so.

Subsequently, FEIA filed the First Amended Complaint in this Court, seeking only damages.

Underlying PAWA's refusal to arbitrate the dispute is PAWA's position that the Board of Adjustment lacks jurisdiction to decide the grievance. PAWA claims that representational issues, namely, whether two related airlines will be treated as a single carrier for representation purposes, and what should be the effect of one carrier's collective bargaining agreement with a union when that carrier acquires or becomes affiliated with a second carrier, are implicated. When representation issues are involved, the exclusive statutory decision-making authority of the National Mediation Board is invoked. The issue now before the Court is whether the exclusive jurisdiction of the National Mediation Board over "representational disputes," pursuant to § 2 Ninth of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 Ninth, precludes resolution of the dispute by a Board of Adjustment acting pursuant to § 204 of the RLA, 45 U.S.C. § 184 and Article 23 of the parties' collective bargaining agreement.

Discussion

This action involves the threshold jurisdictional question of which forum will initially entertain the dispute. FEIA claims that the present conflict with the defendants is a "minor" dispute, and under the statutory resolution scheme of the RLA, the Court should therefore compel PAWA to submit to arbitration before the Board of Adjustment. PAWA, while agreeing that the dispute is minor, argues that the dispute is also representational. As such, it would have to be resolved by the National Mediation Board, and the Court would consequently lack subject matter jurisdiction.

A brief review of the tripartite dispute resolution scheme established by Congress in the RLA is necessary for the resolution of the jurisdictional question presented by this case. The RLA regulates labor relations on the nation's railroads and airlines.

Appendix B

The statute defines three types of labor disputes, and establishes a distinct resolution procedure for each type of dispute.

"Minor" disputes concern the application or interpretation of an existing collective bargaining agreement. *See* 45 U.S.C. § 184. These disputes are "committed to a grievance-arbitration process" before an authorized system board of adjustment. *See, e.g., IUFA* v. *Pan American World Airways, Inc.*, 664 F.Supp. 156, 158 (S.D. N.Y.1987), *aff'd*, 836 F.2d 130 (2d Cir.1988). "Major" disputes involve the formation of collective bargaining agreements, and the resolution of such disputes proceeds according to conference and mediation procedures, pursuant to section 6 of the Act. *See* 45 U.S.C. §§ 156, 181. Neither party contends that the present dispute is "major."

Finally, "representation" disputes involve the definition of a bargaining unit, and the determination of employee collective bargaining representatives. "Representation" disputes include whether two related carriers will be treated as one for representation purposes, and whether a craft or class must be system-wide or may be split for representation purposes. *See IUFA, supra*, 664 F.Supp. at 158. Under Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152 Ninth, the National Mediation Board has exclusive jurisdiction over all representation disputes.

In deciding whether a particular labor dispute is minor, major or representational, a court is guided by certain widely accepted principles. Justice O'Connor, sitting as a Circuit Justice, observed that:

> [t]he great weight of the case law supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board

Western Airlines v. *Intern. Broth. of Teamsters*, 480 U.S. 1301, 1305, 107 S.Ct. 1515, 1517, 94 L.Ed.2d 744 (O'Connor, Circuit Justice 1987).

It is also generally recognized that what may be characterized as a "minor" dispute over the interpretation of a contract may also implicate concerns which are representational in nature. The proper course for a court to follow in such circumstances is to allow the National Mediation Board "alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Int. Bro. of Teamst. Etc. (Air. Div.)* v. *Tex. Int. Air.*, 717 F.2d 157, 164 (5th Cir.1983). *See also Western Airlines, supra*, 480 U.S. at 1305, 107 S.Ct. at 1517. Moreover, even though a representational dispute may be murky, its presence, together with the traditionally narrow role of the courts in enforcing the RLA, requires the conclusion that the Court lacks subject matter jurisdiction over the action. *Air Line Pilots Ass'n* v. *Texas Intern. Airlines*, 656 F.2d 16, 24 (2d Cir. 1981).

Both parties recognize that many of these same issues, involving these same entities, were resolved by the Court in *IUFA*, *supra*, 664 F.Supp. 156. This action largely turns on the degree that the factual and legal principles here are the same, or distinguishable, from that case. In *IUFA*, a flight attendant's union brought a action against a subsidiary airline (PAWA) and its parent company (Pan Am Corp.), alleging that they violated the Railway Labor Act and a collective bargaining agreement by refusing to arbitrate a contract dispute. The District Court, Sand, J., granted the defendants' motion to dismiss for lack of subject matter jurisdiction. The Court held that the union's claim that flight attendants on the union's seniority list had the right to perform work on flights of another subsidiary airline, which was then being performed by unrepresented employees, involved a representation dispute and, consequently, the exclusive jurisdiction of the National Mediation Board. The Second Circuit subsequently affirmed the District Court's decision.

Appendix B

Demand for Work Versus Claim for Damages

Plaintiff's attempts to distinguish *IUFA* and the present case ultimately turn upon the notion that seeking contractual damages calls for a different result than seeking the right to perform the work; that representational issues are not implicated in the former action, while they may be in the latter.[1] The Court does not find this distinction determinative, and it does not strike at the essence of the *IUFA* opinion. The *IUFA* Court stated, "[i]n essence . . . [t]he IUFA flight attendants in this case claim, just as the pilots in *Air Line Pilots Ass'n* v. *Texas Intern. Airlines*, 656 F.2d 16 (2d Cir.1981) claimed, that work on a related carrier should be assigned to them." That same basic question underlies any claim for past damages here; the union claims that work on a related carrier should have been assigned to them.

Plaintiff seeks to isolate the damage issue from a determination of representation, but the inquiries are inextricable. In order to determine whether the plaintiff is entitled to damages, the court must first conclude that the union is entitled to the work. Deciding the representation issue is a necessary predicate to determining whether a contractual remedy of damages is appropriate.

The *IUFA* Court highlighted several factors that are indicative of representational concerns. First, when the application of previously obtained certification by a union to a newly acquired subsidiary is not clear, a representation issue may be said to exist. Second, whether two related carriers should be treated as a single carrier for representational purposes involves a matter within the National Mediation Board's jurisdiction. *IUFA*, *supra*, 664 F.Supp. at 158.

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[1] The Court notes that plaintiff's original complaint did not make any allusions to a distinction between damages and demanding the work itself. FEIA demanded both the work and damages. After the *IUFA* decision, plaintiff amended its complaint to make the claim for damages alone.

FEIA's attempts to show the irrelevancy of the aforementioned factors to the present case in fact demonstrate that FEIA's postulated distinction between damages and injunctive-type relief is not meaningful. first, FEIA argues that in *IUFA*, but not in the case at hand, the result of the implementation of a contractual provision was the reassignment of all of one bargaining unit's work to another, which determined all questions about the representation of the first unit by extinguishing it. It is clear, however, that an award of damages here would effectively require the same determination, namely, that the FEIA bargaining unit has a superior and controlling right to the work. An award of the damages sought here would have the same practical effect on settling representation issues, and extinguishing the possibility of a separate Ransome bargaining unit.

Second, FEIA notes that the *IUFA* Court had to make a preliminary determination of whether the Ransome flight attendants should be considered to be on the Pan Am Seniority List, in order to determine whether any Ransome employees needed to be displaced. Again, that same essential determination, whether Ransome workers have a right to be considered for the work, is necessary in the case at hand. To grant the damages which the plaintiff seeks, the Court must resolve the right to the work against the Ransome employees.

Plaintiff also looks to the Seventh Circuit decision in *Hutter Construction Co.* v. *Local 139*, 862 F.2d 641 (7th Cir.1988) to justify its argued distinction between a demand for work and for damages. That case does not support plaintiff's attempt to gloss over the representational issues raised in this dispute. The Court initially notes that *Hutter* arises in an entirely different statutory context than the case at bar. It has been true for some time that, under the National Labor Relations Act, certain contract interpretation questions and some related questions (*e.g.* "unfair labor practice" or "jurisdictional" claims), normally reserved for resolution by the National Labor Relations Board, may be resolved in

separate forums simultaneously. *See, e.g., Local Union 33*, 289 NLRB No. 167, 129 LRRM 1311, 1314 (1988). Under the RLA, however, there is no such thing as an "unfair labor practice" or a "jurisdictional" claim, and the FEIA does not indicate any valid authority under the RLA for violating the National Mediation Board's exclusive jurisdiction by submitting representational issues, even when such issues are intertwined with contractual claims, to a Board of Adjustment.

Moreover, even if the different statutory schemes were completely analogous, *Hutter* presented a factual and legal situation different from the case at bar. The *Hutter* court was presented with two concluded determinations: an arbitral award of damages to one union under a contract, and a NLRB determination that a different union had a superior "overall" claim to the work, based on "non-contractual" factors. Under the National Labor Relations Act, disputes between two unions over rights to perform work, or "jurisdictional" disputes, fall under the exclusive jurisdiction of the NLRB. In determining that the first claim was not jurisdictional, and therefore properly before the arbitral panel, the *Hutter* court noted that the first union would have had an *independent* contractual claim to damages "even if" it had performed the work itself. *Hutter, supra*, 862 F.2d at 644. This is directly contrary to the present case; FEIA's claim for backpay here rests squarely upon its failure to secure the work in question.

Additionally, the employer in *Hutter* would have avoided its contractual liabilities by recharacterizing the dispute as purely "jurisdictional," and the Seventh Circuit was concerned by that inequitable result. *Id.* It is not apparent that there would be a similar result in the case before this Court. If FEIA's claim for breach of the scope clause of the collective bargaining agreement still exists after the representational issue is addressed by the National Mediation Board, a Board of Adjustment can resolve that dispute. Finally, the separate nature of the contractual and jurisdictional issues in *Hutter* led that court to conclude that the

awards were not inconsistent, and that the jurisdictional determination was not a necessary prerequisite to the award of back pay. As indicated in the discussion above, this is not analogous to the situation presented by this case.

FEIA claims that it is not asking the Board of Adjustment to order a change in the work assignment policy of Pan Am Corp., *see* Plaintiff's Memorandum in Support of Summary Judgment at 14, but it is clear that plaintiff *is* asking the Board of Adjustment to determine that *every time* work is assigned in accord with the existing policy, Pan Am Corp. will incur liability to the FEIA. Characterizing the claim as one for only "past" damages does not alter the practical effect on the prospective work assignments. In order to end double payments, it is likely that PAWA will try to terminate the employment of non-FEIA members, or attempt to recognize the union. A representational stake might even be created, if, by an award of damages, Ransome employees felt pressure to unionize. FEIA's semantic manipulations do not alter the fact that FEIA is challenging, in a very real way, the work assignment policy of Pan Am Corp., following its acquisition of Ransome.

The case before the Court may not be a traditional dispute over representation, as the union's complaint is best cast in contract terms. But, as the Court in *IUFA* recognized, Ransome employees can have "representational state," regardless of the terms in which the representational issues are couched. This representational stake was said to exist in *IUFA* largely because of the presence of the two factors noted above, namely the question of the application of previously obtained certification to Ransome employees, and whether two related carriers should be treated as a single carrier for representation purposes. Both of these factors clearly exist in the present case.

The Court concludes that this case is not distinguishable from the situation presented in *IUFA*. There, as here, the fundamental organizational and representational rights of workers

were involved. This conclusion is consistent with the purposes underlying the Railway Labor Act, which was designed explicitly to protect the rights of employees to organize, or not to organize, as they saw fit. That act designates the National Mediation Board as the body to insure that such rights are secured. *See, e.g.*, 45 U.S.C. §§ 151a(2), (3), and 45 U.S.C. § 152, Fourth. The District Court in IUFA acknowledged that the question there was "close," and this case similarly presents a "close" question. The distinctions between that case and this one, however, are not material or significant for these purposes, and do not alter the conclusion that the dispute involves representational issues. The Court will not divert from the *IUFA* decision.

Conclusion

An issue of representation arises in enforcing the collective bargaining agreement between the FEIA and PAWA. It is settled that a "court may not entertain an action involving . . . a [representation] dispute even if it arises in the context of otherwise justiciable claims." *Int. Bros. of Teamsters* v. *Tex. Int. Airlines, supra*, 717 F.2d at 159. The National Mediation Board has exclusive jurisdiction in such representational disputes, and the jurisdictional scheme of the RLA does not permit the submission of such questions to a Board of Adjustment, on the hope that the resulting resolution will not be inconsistent with employee representation rights. The National Mediation Board can, as it did subsequent to the *IUFA* decision, accept the union's petition for an election to determine whether it might represent the Ransome OTI's.[2] The National Mediation Board can also clarify the "certification" it issued in 1968 to the FEIA, and determine whether PAWA and Ransome are a "single carrier."

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[2] In *IUFA* the Circuit Court was satisfied with the subsequent election, in that it underscored the correctness of the District Court's decision that representation issues within the jurisdiction of the National Mediation Board were implicated. *See, IUFA*, 836 F.2d at 131.

Regardless of what course of action the National Mediation Board takes, it must have the opportunity to define how, and by whom, groups of employees in this airline merger situation are to be represented. Only then may the union and the employer, or their arbitrator, establish or interpret contractual working conditions.

For the foregoing reasons, defendants' motion to dismiss on subject matter jurisdiction grounds is granted, and plaintiff's motion for summary judgment is accordingly denied.

SO ORDERED.

APPENDIX C

Collective Bargaining Agreement:
Article I—Recognition and Scope .
Appendix U—Letter Agreement . . . . .

PREAMBLE

THIS AGREEMENT made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between Pan American World Airways, Inc., a New York Corporation (hereinafter sometimes referred to as the "Company"), and the class or craft of employees, namely the Operations Training Instructors in the employ of Pan American World Airways, Inc., as represented by the Flight Engineers' International Association, PAA Chapter AFL/CIO (hereinafter sometimes referred to as the "Association").

WITNESSETH

It is hereby mutually agreed:

ARTICLE 1
RECOGNITION AND SCOPE

A. The Flight Engineers' International Association, AFL/CIO is recognized by the Company in accordance with the National Mediation Board's Certification in Case #R3984, dated February 27, 1968 as the sole collective bargaining agent with respect to rates of pay, rules and working conditions of Operations Training Instructors, consisting of two component groups, (1) Flight Engineer Instructors and (2) Ground School Instructors, all as included in the certification and employed by the Company.

B. Operations Training Instructors by component group, shall exclusively perform the instructional work which is

conducted by the Company requiring the Services of an Instructor in the following areas:

1. Flight Engineer Instructors

a. Simulator Training of Flight Engineers; i.e., initial, transition, recurrent and voluntary training programs.

b. Flight Engineer Support Function as defined in Article 2, when the requirement for such Support Function is determined by the Company.

c. Ground School Classroom and other related Ground Training of Flight Engineers; i.e., for initial, recurrent, requalification, aircraft differences, pre-flight, aircraft familiarization, pre-line briefing, licensing training, Flight Engineer PTM, GSF Ground School day and specialty courses.

2. Ground School Instructors

a. In the Operations and Flight Crew training areas;

(1) All Emergency Procedures Training and new Aircraft Familiarization of Flight Service personnel, both formal classroom and OJT as defined in Article 2.

(2) Dispatcher Training; i.e., initial, recurrent, requalification, and aircraft differences training, both formal classroom and OJT as defined in Article 2.

(3) Pilot and Flight Engineer training; i.e. initial, transition, recurrent, requalification, aircraft differences and licensing training, both formal classroom and OJT as defined in Article 2.

b. In the Maintenance training areas;

(1) Ground training of the Company's Maintenance personnel in aircraft

maintenance subjects in formal classroom and associated OJT as defined in Article 2; i.e., FAA A & P licensing, main base basic aircraft courses, Aircraft General Familiarization (Gen FAM), line station basic aircraft courses, when conducted in the United States or its possessions, specialty courses, TWU skills program and Shop on site formal training (SOFT) type programs.

C. Operations Training Instructors by component group, shall share with other Company personnel in the performance of instructional work which is conducted by the company requiring the services of an Instructor in the following areas:

1. Flight Engineer Instructors

a. Procedural Trainer Mock-up training of pilots and training involving any similar device designed to accomplish similar training objectives. This training is shared with Training Captains.

b. Simulator evaluation of non-Company, contract training Flight Engineer personnel.

c. Any other duties for which such Instructor is or may be qualified, provided that such assignments shall not involve the downgrading in rates of pay for any Instructor, except as provided in Articles 10 and 11.

2. Ground School Instructors

a. In the Operations and Flight Crew training areas:

(1) Procedural Trainer Mock-up training of Pilots and training involving any similar device designed to accomplish similar training objectives. This training is shared with Training Captains.

(2) Ground training of the Company's Airport Services personnel involving operations subjects in formal classroom and associated OJT as defined in Article 2.

(3) Any other duties for which such Instructor is or may be qualified, provided that such assignments shall not involve the downgrading in rates of pay for any Instructor, except as provided in Articles 10 and 11.

b. In the Maintenance training area:

(1) Ground training of the Company's Maintenance personnel in aircraft maintenance subjects involving OJT as described in Article 2, specifically including training involved with aircraft inaugural service.

(2) Ground training of the Company's maintenance personnel in aircraft maintenance subjects in formal classroom and associated OJT as defined in Article 2, conducted outside the United States and its possessions, involving line station basic aircraft courses, line station aircraft refresher courses, line station aircraft avionics courses and certain specialty courses for cargo aircraft and 747-SP differences.

(3) Any other duties for which such Instructor is or may be qualified, provided that such assignments shall not involve the downgrading in rates of pay for any Instructor, except as provided in Articles 10 and 11.

D. It is understood and agreed that the shared areas of training as set forth in C-2-b above, are to be shared with no more than three (3) non-covered Instructors based in London,

United Kingdom, when such training is conducted outside the United States and its possessions.

E. It is understood and agreed that the shared areas of training as set forth in C-2-b above, are to be shared with no more than one (1) non-covered Instructor based in the Company's Internal German Service to provide such training for employees who maintain the Internal German Service aircraft.

F. Under conditions of peak training work load, and/or unanticipated shortage of qualified Instructor personnel, as defined in Article 2, supervisory personnel, limited to those who are involved in the direct supervision of such Instructors at each base, may perform instruction covered by this Agreement and non-management Check Flight Engineers employed by the Company may be utilized to instruct and/or to perform the Flight Engineer Support Function during periods of peak training work load or unanticipated shortage of personnel as defined in Article 2.

G. When assigned by the Company, employees in Instructor categories covered by this Agreement shall perform additional instructional work and develop courses and curricula.

H. It is further understood and agreed that the Company, to the extent it performs work described in paragraphs B and C, above, with its own employees, will assign such work to Instructors covered by this Agreement, except as provided in paragraphs C, D and E.

I. It is agreed that nothing herein is intended to prevent the Company from utilizing technological devices which may have the effect of reducing the need for Instructor personnel under this Agreement, provided that any Instructor who is adversely affected as the direct result of a technological change shall be given a period of not more than ninety (90)

days to qualify for any new position which may be created by such technological change and shall suffer no loss in pay during such qualifying periods. It is further agreed that the Company will use its best efforts to find positions within the Company for such technologically displaced Instructors.

J. This Agreement shall be binding upon any successors, administrators, transferees, executors, and assigns of Pan American World Airways, Inc. ("successors"), and such "successor" shall employ the OTI's on the OTI System Seniority List in accordance with the provisions of this Agreement between the Company and the Association, regardless of the nature of transfer of control (including but not limited to purchase, sale, merger, consolidation, acquisition, leasing of the operation, reorganization, arrangement for the benefit of creditors, bankruptcy).

K. Any provisions of paragraphs A. through I., above, to the contrary notwithstanding:

1. Instructional work described in paragraph B-2-a-(1), above, may be performed by:

   a. Flight Engineer Instructors,

   b. Operations and Flight Crew Training Ground School Instructors,

   c. Maintenance Training Ground School Instructors at their base, and,

   d. as provided in paragraph F., above, by supervisory personnel;

   additionally, subject to paragraphs L and M, below, such work may be performed by independent contractors.

2. Instructional work described in paragraphs B-2-a and C-2-a, above, may be performed by qualified Flight Engineer Instructors.

3. Instructional work described in paragraphs B. and C., above, of other than Company personnel may be performed by independent contractors, subject to paragraphs L. and H. below, or, as provided in paragraph F., above, by supervisory personnel.

L. The Company may not use independent contractors to perform any instructional work described in paragraphs B and C, above, unless both of the following conditions are met:

1. No Instructor who is listed on the Seniority List, dated May 24, 1985, and who is actively employed as an Instructor on March 25, 1986, is on involuntary furlough status; and

2. The instructional work being performed by independent contractors is of the type described in subparagraphs K-1 and K-3, above.

Where the above two conditions are met, the Company may utilize independent contractors, provided that the Company shall continue to utilize fully Instructors covered by this Agreement, who are qualified to perform the said work, consistent with scheduling limitations and their aircraft or other regular work assignments.

M. In the allocation of training assignments under paragraphs K and L, above, between Instructors covered by this Agreement and independent contractors performing instructional work under paragraphs K. and L., preferences expressed by Instructors covered by this Agreement shall be granted, to the maximum extent consistent with operational requirements and the needs of the service, for work assignments (including those involving travel), hours, and days off.

APPENDIX U

February 19, 1986

Mr. John Budd
President, PAA Chapter
Flight Engineers International Association
P.O. Box 5006, Roosevelt Field Mall
Garden City, N.Y. 11530

Mr. James Jouver
Vice President-Instructors, PAA Chapter
Flight Engineers International Association
P.O. Box 5006, Roosevelt Field Mall
Garden City, N.Y. 11530

Gentlemen:

This will confirm the following agreement made by Pan American Corporation and Pan American World Airways, Inc. with FEIA in the negotiations leading to the 1986 Operations Training Instructors Agreement, to run concurrently with the Agreement.

Pan American Corporation, parent of Pan American World Airways, Inc., agrees that it or any successor to it will be bound by Article 1 of the Pan American World Airways, Inc.—FEIA collective bargaining agreement covering Operations Training Instructors in the same manner as if references to Pan American World Airways, Inc., in Article 1 read Pan American Corporation.

Appendix C

For:
Flight Engineers
Operations Training Instructors

/s/ John Budd, President

/s/ James Jouver

Vice President-Instructors

For:
Pan American Corporation

/s/ C. Edward Acker

For:
Pan American World
Airways, Inc.

/s/ C.R. Grebey, Jr.
/s/ W.P. Kimmins

APPENDIX D

FEIA Grievance #6276

Letterhead of O'Donnell & Schwartz

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Pan American Corporation, and
Pan American World Airways, Inc.
200 Park Avenue
New York, New York 10166

Attention: Chairman, Instructors' System Board of Adjustment, c/o Mr. Bruce Golden
Labor Relations/Personnel

Re: Failure to employ the OTI group in performing the training of Ransome Airline Flight crew and maintenance personnel: Violation of Appendix "U" and Article 1 A and B.

Dear Mr. Chairman:

In accordance with Articles 22, 23 and all other applicable provisions of the current Agreement covering Operations Training Instructors ("OTI's") between Pan American World Airways, Inc. and the Flight Engineers' International Association, PAA Chapter, AFL/CIO, the Association hereby submits the following grievance. Due to the nature of this grievance, it is being submitted directly to the System Board.

FACTS:

Pan American Corporation has acquired Ransome Airlines, which now operates as a subsidiary of Pan American Corporation. Ransome is serving cities in the northeast quadrant of the

U.S. It operates approximately twelve aircraft, which utilize the services of two pilots per aircraft and a cabin crew and maintenance staff of indeterminate number. In operating Ransome, Pan American Corporation is contractually bound to do so in accord with, Article 1 of the OTI collective bargaining agreement between the Association and Pan American World Airways, Inc.

ISSUE:

Has Pan American Corporation violated Article 1 of the Agreement by the failure of Ransome Airlines to employ the services of Pan Am OTI's in accord with Article 1 of the Agreement.

POSITION OF THE COMPANY:

Unknown.

POSITION OF THE ASSOCIATION:

Pan American Corporation has violated Article 1 A and B of the Agreement by the failure of its subsidiary, Ransome Airlines to employ OTI's in accord with the Agreement.

RELIEF REQUESTED:

1. Find Pan American Corporation to have violated Article 1 A and B of the Agreement.

2. Order Pan American Corporation to require Ransome Airlines to train its personnel in accord with Article 1.

3. Order backpay for all OTI's damaged by the contractual violation.

We request that this matter be heard at the September, 1986 meeting of our System Board.

Respectfully Submitted,

Gerry Horwick
Director—Grievances
FEIA, PAA Chapter, OTI's

APPENDIX E

Amendment of Grievance #6276

Letterhead of

PAN AMERICAN FLIGHT ENGINEERS

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION • PAA CHAPTER • AFL-CIO

June 7, 1988

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Pan American Corporation, and
Pan American World Airways, Inc.
200 Park Avenue
New York, New York 10166

Att: Chairman, Instructors' System Board of Adjustment
c/o Mr. Bruce Golden, Labor Relations/Personnel

Re: *Amendment of FEIA #6276*

Dear Mr. Chairman:

I am writing to amend a grievance submitted to you on August 7, 1986, FEIA #6276, entitled "Failure to employ the OTI group in performing the training of Ransome Airline Flight crew and maintenance personnel: Violation of Appendix U and Article 1A and B."

Please amend the grievance as submitted by eliminating item #2 from "Relief requested." FEIA-PAA Chapter has decided not to seek to require Pan Am Corporation to cause Ransome/Pan Am Express to distribute the work of training its employees in accord with Article 1 of the collective bargaining agreement.

Also, please amend the grievance to eliminate any allegation that Pan Am Corporation has violated Article 1A of the Agreement.

Appendix E

We now allege, in accord with the balance of the grievance, that Pan Am Corporation and Pan American World Airways, Inc., have violated and are continuing to violate Article 1(B) of the Agreement by failing to employ OTI's to train Ransome personnel in accord with Article 1(B). As a remedy we ask that Pan Am Corporation be found to have violated Article 1(B) of the contract, and that OTI's found to have lost work as a result of the violation be compensated for that loss.

Respectfully submitted,

George Kanakis
Director—Grievances
FEIA, PAA Chapter, OTI's

bcc: Tom Lambert
Terry Weber
Ted Moeller
George Kanakis

APPENDIX F

AFFIDAVIT
of James Jouver

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, PAA CHAPTER, AFL-CIO

Plaintiff,

v.

PAN AMERICAN WORLD AIRWAYS, INC., and PAN AMERICAN CORPORATION,

Defendants.

Civil Action No. 87 Civ. 6694 (PKL)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

James Jouver, being duly sworn, deposes and states:

1. I am a Flight Engineer Instructor in the employ of Pan American World Airways, Inc. ("Pan Am")

2. During the negotiations leading to the current (1986-1988) collective bargaining agreement covering Pan Am's Operations Training Instructors ("OTI's"), an agreement between Pan Am and Flight Engineers' International Association, PAA Chapter, AFL-CIO ("FEIA" or the "Union"), the National Mediation Board ("NMB") certified collective bargaining representative of the OTI's, I was a Vice President of FEIA. As such I participated in negotiations, and am fully familiar with them.

Appendix F

3. OTI's at Pan Am are divided into two categories: Flight Engineer Instructors ("FEI's") and Ground School Instructors ("GSI's"). The responsibility of FEI's deals, in the most general terms, with the instruction of Pan Am's flight engineers as flight engineers; job duties which only these FEI's may perform are set forth at Article 1(B) (1)(a), (b) and (c). GSI's at Pan Am are divided into two groups. In the Operations and Flight Crew area, GSI's "shall exclusively perform the instructional work which is conducted by the Company requiring the services of an Instructor . . ." (quotation from prefatory sentence of 1(B)) in those areas set forth in Article 2 (A) (1), (2) and (3). These areas are: emergency procedures training (2(a)(1)); dispatcher training; and certain training of both pilots and flight engineers. GSI's in the Maintenance area are the only ones who may perform ground school training of Company maintenance personnel in those areas enumerated in Article 1(B)(2)(b).

4. The work preservation provisions of the OTI Agreement, called "Scope" provisions, in accord with industry practice, have been included (with minor modifications) in the OTI Agreement for approximately ten years. Numerous grievances have arisen regarding alleged violations of the Scope provisions; many resulted in payments to members of the bargaining unit to compensate them for work assigned to non-bargaining unit members, whether or not they were Pan Am employees, in violation of the Scope provisions.

5. At the time of the negotiation of the last collective bargaining agreement, FEIA expressed to Pan Am the need to seek to place the "Scope" provisions of the Agreement on a firmer basis. The reason for this was the earlier establishment of Pan Am Corp. as the holding company for Pan Am; the Union feared not only that work already "belonging" to its OTI's under the OTI Agreement would be done for and by non-Pan Am subsidiaries of Pan Am Corp., but also that Pan Am Corp. would add new instructional work only to non-Pan Am subsidiaries where they would not be done by Pan Am's OTI's, thus depriving the OTI

unit of the opportunity to grow or at least to substitute for lost work.

6. Flight engineers, who are the third men in the cockpit, are steadily diminishing in numbers at Pan Am as well as at other airlines. New aircraft, such as the B-767, require only two pilots. Since much OTI work involves instructing flight engineers, the long run health of the bargaining unit depends on the addition of new work to the bargaining unit.

7. As a result of negotiations on this subject, a letter dated February 19, 1986 was signed by FEIA, Pan Am, and Pan Am Corp. and was appended to the Agreement as Appendix U. The letter stated in relevant part:

> "Pan American Corporation, parent of Pan American World Airways, Inc., agrees that it or any successor to it will be bound by Article 1 of the Pan American World Airways, Inc.—FEIA collective bargaining agreement covering Operations Training Instructors in the same manner as if references to Pan American World Airways, Inc., in Article 1 read Pan American Corporation."

The letter agreement was a significant one for FEIA, and enabled the Union to sign the Agreement in spite of concessions it contained.

_____

James Jouver

Sworn to before me this
10th day of November, 1988

_____

Notary Public

APPENDIX G

AFFIDAVIT
of David Rosen

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, PAA CHAPTER, AFL-CIO

Plaintiff,

v.

PAN AMERICAN WORLD AIRWAYS, INC., and PAN AMERICAN CORPORATION,

Defendants.

Civil Action No. 87 Civ. 6694 (PKL)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:

David B. Rosen, being duly sworn, deposes and states:

1. I am an attorney, in the firm of O'Donnell & Schwartz, counsel to Flight Engineers' International Association, PAA Chapter, AFL-CIO ("FEIA" or the "Union") during the period covered by the dispute herein. I am fully familiar with the circumstances surrounding the dispute whose status is the subject of this case.

2. At all relevant times, Pan Am has been bound by a collective bargaining agreement (the "Agreement"), dated February 19, 1986, and not reopenable until July 1, 1988. All the terms and con-

ditions of employment set forth in the Agreement have continued in effect since that date by virtue of § 6 of the Railway Labor Act, 45 U.S.C. § 156.

3. In April, 1986, FEIA was informed that Pan Am Corp. has purchased a small commuter airline called "Ransome Airline" ("Ransome"). The airline was not purchased to be merged into Pan American World Airways, Inc. ("Pan Am"), as had been the case with such earlier (and far larger) acquisitions as National Airlines. Rather, Pan Am Corp. retained Ransome as a separate subsidiary.

4. Ransome was later renamed "Pan Am Express."

5. FEIA has determined, by information acquired and by knowing F.A.A. requirements for instruction at airlines, that Ransome's operations require the services of instructors in all areas covered by Article 1(B)(2) of the OTI's collective bargaining agreement, to wit:

- emergency procedures training of flight service personnel (flight attendants) (1(B)(2)(a)(1));
- dispatcher training (1(B)(2)(a)(2)); and
- training of pilots in the various F.A.A. required courses set forth in Article 1(B)(2)(a)(3).

Ransome's operations also require it to do the maintenance training specified in Article 1(B)(2)(b).

6. Pan Am Corp., as well as Pan Am, had promised (Appendix U) that GSI-OTI's would "exclusively" perform the above work for it. In spite of its promises, Pan Am Corp. did not cause Ransome to reassign the work to Pan Am OTI's. Instead, the work was done,as before, by a combination of Ransome employees and others (but not Pan Am OTI's).

7. The allegations in ¶ 5 led FEIA to file its initial grievance in this matter (Ex. D to First Amended Complaint).

8. The grievance was processed by FEIA in accord with Article 23 of the Agreement. However, Pan Am and Pan Am Corp.

refused to permit the grievance to be resolved by arbitration absent a court order compelling them to do so, arguing that the Board of Adjustment had no jurisdiction over it.

9. On June 7, 1988, FEIA amended its grievance (*see* Ex. E to First Amended Complaint).

10. Defendants did not alter their position regarding the grievance, despite this amendment.

11. The work which Pan Am Corp. promised to assign "exclusively" to Pan Am OTI-GSI's has continually been assigned to non-Pan Am OTI's since the acquisition of Ransome.

_____

David B. Rosen

Sworn to before me this
10th day of November, 1988

_____

Notary Public

APPENDIX H

STATUTES: RELEVANT PROVISIONS OF THE RAILWAY LABOR ACT

Section 1(a), 45 U.S.C. § 151(a)

§ 151a. General purposes

The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Section 2 First, 45 U.S.C. § 152 First

§ 152. General duties

First duty of carriers and employees to settle disputes. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Appendix H

Section 2 Ninth, 45 U.S.C. § 152 Ninth

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Section 3 First (i), 45 U.S.C. § 153 First (1)

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of

pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [enacted June 21, 1934], shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Section 3 First (m), 45 U.S.C. § 153 First (m)

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

Section 204, 45 U.S.C. § 189

§ 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [enacted Apr. 10, 1936] before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

Appendix H

It shall be the duly of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title [45 USCS §§ 181 et seq.] to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act [45USCS § 153].

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title [45UCS §§ 181 et seq.], from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similar limited jurisdiction.

Supreme Court, U.S.
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No. 89-1532

In The

Supreme Court of the United States

October Term, 1989

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, PAA CHAPTER, AFL-CIO,

Petitioner,

-against-

PAN AMERICAN WORLD AIRWAYS, INC. and PAN AMERICAN CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether, under the Railway Labor Act, the District Court, as affirmed by the Court of Appeals for the Second Circuit, properly dismissed a union's action to compel arbitration of a grievance for a claimed breach of a collective bargaining agreement – the failure to reassign work of a recently acquired airline's employees (not represented by the union) to employees of an affiliated airline (who are represented by the union) – where the grievance, although it does not seek the actual reassignment of work across the corporate lines of the affiliated airlines but rather damages in lieu of such reassignment, implicates a "representation" dispute within the exclusive jurisdiction of the National Mediation Board to resolve, which dispute had never been submitted to the Board.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 1

ARGUMENT 4

There Is No Substantial Need to Grant The Petition 4

CONCLUSION 12

TABLE OF AUTHORITIES

Page

The Decision For Which Review Is Sought:

Flight Engineers' Int'l Ass'n v. Pan American World Airways, 896 F.2d 672 (2d Cir. 1990), *aff'g* 716 F.Supp. 110 (S.D.N.Y. 1989) ..... *passim*

OTHER CASES:

Air Line Employees Ass'n v. Republic Airlines, Inc., 798 F.2d 967 (7th Cir.), *cert. denied*, 479 U.S. 962 (1986) 6, 8

Air Line Pilots Ass'n v. Texas Int'l Airlines, 656 F.2d 16 (2d Cir. 1981) 6

Association of Flight Attendants v. Delta Airlines, 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, 58 U.S.L.W. 3625 (April 2, 1990) 7, 8, 9

IBTCWHA, Local Union 2702 v. Western Air Lines, 854 F.2d 1359 (9th Cir. 1988), *upon remand from Delta Air Lines v. International Bhd. of Teamsters*, 484 U.S. 806 (1987) 6

International Bhd. of Teamsters v. Texas Int'l Airlines, 717 F.2d 157 (5th Cir. 1983) 6

IUFA v. Pan American World Airways, Inc., 664 F. Supp. 156 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 130 (2d Cir. 1988) 6

Jones v. Trans World Airways, 495 F.2d 790 (2d Cir. 1974) 9

Order of Railway Conductors v. Pitney, 326 U.S. 561 (1946) 7

Order of Railway Conductors v. Switchmen's Union of North America, 269 F.2d 726 (5th Cir. 1959) 9

TABLE OF AUTHORITIES – Continued

Page

Slocum v. Delaware L. & W.R. Co., 339 U.S. 239 (1950) 7

Switchmen's Union of North American v. Southern Pacific Co., 253 F.2d 81 (9th Cir. 1959) 9

T.-C.E. Union v. Pacific R. Co., 385 U.S. 157 (1966) 7

Western Airlines v. International Bhd. of Teamsters, 480 U.S. 1301 (1987) (O'Connor, J., Circuit Justice) 6

National Mediation Board Determinations:

Chesapeake & Ohio R. Co., 4 NMB 215 (1962) 11

Pan American World Airways, 3 NMB 41 (1957) 11

Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry, 14 NMB 388 (1987) 8

Republic Airlines, 8 NMB 49 (1980) 8

Trans World Airlines/Ozark Airlines, 14 NMB 218 (1987) 8

STATUTES:

Railway Labor Act, 45 U.S.C. § 151 *et seq.* ..... *passim*

OTHER AUTHORITIES:

Rehmus, *Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries*, The Railway Labor Act at Fifty (1976) 10

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

The petition of the plaintiff-petitioner union ("FEIA") seeks review of the affirmance by the Second Circuit Court of Appeals, reported at 896 F.2d 672 (2d Cir. 1990), of the dismissal of the FEIA's amended complaint by the District Court in a decision reported at 716 F.Supp. 110 (S.D.N.Y. 1989). FEIA's dispute with the defendants-respondents[1] arose out of the 1986 purchase by defendant-

[1] As indicated in this paragraph, the respondents are two related corporations: Pan American World Airways, Inc., is a

(Continued on following page)

respondent Pan Am[erican] Corp., a holding company that is not an airline, of a small independent pre-existing airline (Ransome Airlines, later renamed Pan Am Express, Inc.) and Pan Am Corp.'s decision to operate its Ransome/Pan Am Express subsidiary separately from its other airline subsidiary, defendant-respondent Pan American World Airways, Inc ("PAWA").

The FEIA is, pursuant to a certification issued by the National Mediation Board ("NMB") in 1968, the exclusive bargaining representative under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), of Operations Training Instructors (OTI's) employed by PAWA. In that representative capacity, the FEIA has had a collective bargaining agreement with PAWA (whose Article 1 Pan Am Corp. agreed to honor), by which FEIA-represented OTI's employed by PAWA were entitled to do certain training work PAWA might conduct. To use the agreement's precise language at Article 1(B) – a "scope clause" – FEIA-represented PAWA-employed OTI's "shall exclusively perform the instructional work conducted by the Company [defined in the contract's preamble as "Pan American World Airways, Inc., a New York Corporation"] requiring the Services of an Instructor in [various specified] areas." Ransome/Pan Am Express has historically done that work, and continues to do that work, with its *own* personnel (about 16 individuals), some now represented by unions other than FEIA and the rest unrepresented.

(Continued from previous page)

wholly owned subsidiary of Pan Am Corp., referred to in the caption as "Pan American Corp."

Because the FEIA wanted that Ransome "work" or, rather, money for having its members not do that work, the FEIA filed a grievance claiming, in its amended form, that PAWA and Pan Am Corp. were violating the PAWA-FEIA agreement's "scope clause" by not giving Ransome/Pan Am Express training work to OTI's represented by the FEIA. In the amended grievance, FEIA said that it had

> decided not to seek to require Pan Am Corporation to cause Ransome/Pan Am Express to distribute the work of training its [*i.e.*, Ransome's] employees in accord with Article 1 of the collective bargaining agreement.
>
> We now allege, in accord with the balance of the [original] grievance, that Pan Am Corporation and Pan American World Airways, Inc., have violated and are continuing to violate Article 1(B) of the Agreement by failing to employ OTI's to train Ransome personnel in accord with Article 1(B). As a remedy we ask that Pan Am Corporation be found to have violated Article 1(B) of the contract, and that OTI's found to have lost work as a result of the violation be compensated for that loss.

PAWA refused to arbitrate that amended grievance before a panel called an "adjustment board" because the grievance involved, in PAWA's view, a representation issue within the exclusive jurisdiction of the National Mediation Board under the RLA's Section 2, Ninth (45 U.S.C. § 152, Ninth), and that representation issue had *not* been presented to that Board. This action sought to compel that arbitration without the NMB's having been asked to resolve any aspect of the dispute.

The District Court dismissed the action for lack of subject matter jurisdiction, reasoning that because the grievance *involved* a representation question – *e.g.*, whether the NMB-issued certification issued to a union so it may represent *one* carrier's employees should be interpreted to cover the employees of a newly affiliated carrier, or whether two newly affiliated carriers should be treated as a "single carrier" for representation purposes, or what is the effect on a union's representation rights (and contract) when the carrier its contract is with becomes involved in an acquisition of, or affiliation with, another carrier having its own employees (who in turn have their own statutory representation rights and interests under the RLA) – only the *NMB* (not an arbitrator, or a court) had the jurisdiction to resolve the dispute in the first instance. The District Court further noted that for an adjustment board to award the money damages the FEIA seeks, *i.e.*, wages for work not performed, the adjustment board would *first* have to determine that the FEIA was entitled to cross the corporate boundaries of a newly acquired airline to perform Ransome's training work historically performed by Ransome's own employees, which underlying determination involves deciding a representation issue that only the NMB could resolve, and the NMB had not been presented with that issue. The Second Circuit affirmed.

ARGUMENT

There Is No Substantial Need To Grant The Petition

The Second Circuit recognized that the dispute the union wished to have arbitrated, while it obviously was

framed in terms of a dispute involving the interpretation of a collective bargaining agreement – which kind of dispute is often termed a "minor dispute" and is normally resolvable only by adjustment boards established under the RLA (45 U.S.C. §§ 153, 184) – *also* involved a representation issue: the FEIA's dispute

> "presents . . . factors which . . . implicate[] representation concerns within the exclusive jurisdiction of the NMB, i.e., whether the union's certification applied to the subsequently acquired Ransome subsidiary and whether the two related airlines should be treated as a single carrier for representation purposes.

896 F.2d at 673.

The fact that the FEIA's grievance did not seek the actual reassignment of work across corporate boundaries but just damages for not getting the work reassigned did not make the representational aspect of the dispute disappear:

> [A]n award of the damages sought here – or even a realistic threat of such an award – would have the same practical effect as work reassignment on settling representation issues by extinguishing the possibility of a separate Ransome bargaining unit. No company in its right mind would continue to pay twice for the same work; it would take steps to transfer the work, if it could. Thus, like the district court, we reject FEIA's characterization of the present conflict as involving solely a "minor dispute," that is, a dispute over the interpretation or application of existing collective bargaining agreements, which under § 204 of the Act, 45 U.S.C. § 184, is committed to an authorized Board of Adjustment for resolution.

> As the district court pointed out, the NMB "must have the opportunity to define how, and by whom, groups of employees in this airline merger situation are to be represented;" only after the NMB's determination "may the union and the employer, or the arbitrator, establish or interpret contractual working conditions." 716 F.Supp at 116.

896 F.2d at 673-74.

By its decision, the Second Circuit in essence said it would stay with the many Courts of Appeals that have entertained this sort of question and have decided that, in the context of an airline merger or acquisition, an otherwise justiciable (contract-interpretation) dispute involving or implicating representation questions must (at least in the first instance) be referred to the NMB for its determination of the representation question. *See*, in addition to the decision cited by the Second Circuit, *Western Airlines, Inc. v. International Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., sitting as Circuit Justice) ("The great weight of the case law supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board), such cases as *Air Line Employees Ass'n v. Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir.), *cert. denied*, 479 U.S. 962 (1986); and *International Bhd. of Teamsters v. Texas Int'l Airlines*, 717 F.2d 157 (5th Cir. 1983). *See also IBTCWHA, Local Union 2702 v. Western Air Lines*, 854 F.2d 1359 (9th Cir. 1988), *upon remand from Delta Air Lines v. International Bhd. of Teamsters*, 484 U.S. 806 (1987); *Air Line Pilots Ass'n v. Texas Int'l Airlines*, 656 F.2d 16 (2d Cir. 1981); *IUFA v. Pan American World*

Airways, Inc., 664 F.Supp. 156 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 130 (2d Cir. 1988).[2]

In trying to create a possible Circuit Court conflict, FEIA points to *Association of Flight Attendants v. Delta Airlines*, 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, 58 U.S.L.W. 3625 (April 2, 1990) ("*AFA-Delta*"), as a decision that is supposedly irreconcilable with the Second Circuit's *FEIA* decision. The two decisions, while their conceptual approaches may differ, are *not* irreconcilable as the Second Circuit itself suggested below. First of all, in the *AFA-Delta* case the representational aspects of the dispute between the parties – involving, from the union's perspective, the correctness under a union contract of an airline's corporate decision to sign a particular kind of merger agreement with another airline – had, by the time the case had arrived at the Court of Appeals, been completely *resolved* (and resolved by the proper agency, the

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[2] The decisions of this Court that the FEIA's petition cites (at 8) for the proposition that work-assignment disputes between unions should be arbitrated are inapposite. As a review of those cases (*T.-C.E. Union v. Pacific R. Co.*, 385 U.S. 157 [1966]; *Slocum v. Delaware L. & W.R. Co.*, 339 U.S. 239 [1950]; and *Order of Railway Conductors v. Pitney*, 326 U.S. 561 [1946]) would show, what this Court was saying there was that work assignment disputes between unions on a *single* carrier should be arbitrated before the National Railroad Adjustment Board with all the unions invited to participate. Not only would an arbitration proceeding on the FEIA's grievance be one that the representatives of Ransome employees would *not* be invited to participate in (and could not participate in under the terms of the FEIA-PAWA contract establishing the adjustment board in this matter), but the underlying question here is precisely *whether* PAWA and Ransome make up a *single* carrier or not, which only the NMB may decide.

NMB): the NMB had issued a determination as to the effect of a certificate the NMB itself had issued to a union to be the exclusive representation of a class of employees of an airline that had since been merged into another, by which determination the NMB had decided that that union, under the RLA, should no longer represent those employees. In other words, by the time the case reached the Court of Appeals, there no longer was *any* "single carrier" or any other form of *representation issue* left to be resolved. In *FEIA*, however, the NMB had *never* been asked to do *anything*, *e.g.*, asked to clarify the FEIA's original NMB-issued certification so that it might cover operations of a related corporation, or otherwise determine that PAWA and Ransome formed, in effect, a "single carrier" (whose training employees, therefore, FEIA might come to represent by an NMB-conducted election or by some decision of the NMB applying the representational requirements of the RLA to the particular facts).[3]

Second, and perhaps more importantly, there is a critical factual difference between the *FEIA* and *AFA-*

[3] It is *not* true, contrary to the FEIA's petition's statement (at 11), that any NMB-issued certifications are extinguished automatically by operation of law. The NMB has made clear that, while it once had written words (in *Republic Airlines*, 8 NMB 49, 54-55 [1980]) some had so interpreted, nothing in fact was automatic. The *NMB*, which has developed its own special procedures for handling representation questions in the merger or acquisition context, resolves the representation/continuing-effect-of-certification questions on the basis of each case's specific circumstances. *See, e.g., Trans World Airlines/Ozark Airlines*, 14 NMB 218 (1987), clarifying *Republic*, and the NMB's "Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry," 14 NMB 388 (1987).

Delta cases arising from the difference between the underlying grievances filed by the unions in these two cases. The FEIA's grievance would *require* the adjustment board arbitration panel, in order to award the requested relief of damages, *first* to make a representation determination: that the union certified by the NMB to represent *one* carrier's employees was entitled to cross at least nominal corporate boundaries and claim an affiliated carrier's work as if the two carriers were a single carrier. The union's grievance in *AFA-Delta*, however – especially by the time that case had reached the D.C. Circuit – did not require the arbitrator to make a representation decision *because the NMB had already made it* (by extinguishing the grieving union's certification to represent a class of one airline's [Western's] employees).

Beyond reliance on *AFA-Delta*, FEIA's petition reasserts related arguments raised and properly rejected below: that the sanctity of contracts and the inability of the *NMB* to enforce FEIA's contract rights in the way FEIA wants require arbitration of FEIA's amended grievance. Those arguments do not merit further review in this case. As to the sanctity of contracts argument, FEIA fails to recognize that where, as here, fundamental *statutory* representational rights are involved, what an employer and a union may have agreed to is not – and cannot be – necessarily controlling. *See, e.g., Jones v. Trans World Airways*, 495 F.2d 790, 797 (2d Cir. 1974); *Order of Railway Conductors v. Switchmen's Union of North America*, 269 F.2d 726, 731 (5th Cir. 1959); *Switchmen's Union of North America v. Southern Pacific Co.*, 253 F.2d 81 (9th Cir. 1959). Any other approach would give to a carrier and union, or (here) an arbitrator selected by the carrier and union, the

right to make, in effect, representational choices for employees despite the fact that the Railway Labor Act reserves the making of such choices, through the processes of the National Mediation Board, ultimately to the employees.[4]

That the NMB may lack the power to enforce a collective bargaining agreement is irrelevant here because, as explained above, a contract-interpretation dispute implicating a representation issue must go initially to the NMB for that Board to resolve the representation issue. The NMB could, however, do many relevant things. It could, for instance, clarify or interpret the "certification" *it* had issued to the FEIA in 1968 declaring the FEIA to be the exclusive representative of PAWA's OTI's, that is (for instance), decide whether that "certification" covers not only the "craft or class" of PAWA's OTI's but also the instructor personnel of its new sister corporation Ransome; or the NMB could be asked to determine whether PAWA and Ransome are, to use the NMB's terms, a

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[4] This critical point is intertwined with the genesis of the RLA whose provisions as to representation (*i.e.*, especially 45 U.S.C. §§ 152, Fourth and 152, Ninth) took into account the problems raised by a nominally mostly organized railroad industry in which large numbers of unions were in fact controlled in one way or another by the railroads. *See, e.g.*, Rehmus, *Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries*, The Railway Labor Act at Fifty 9-14 (1976). So what a union and a carrier might agree to as to representation is invalid if inconsistent with the democratic principles set out in RLA Section 2, Fourth, which principles of course the *NMB* is designed and empowered to effectuate.

"single carrier" or single "transportation system."[5] The outcome of such proceedings might result in the expansion of the FEIA's representative status (and its contract). Moreover, the FEIA could also ask the NMB to determine, probably by an election, whether the Ransome training personnel should be separately represented and, if so, by whom (if anyone).

Thus, utilization of the NMB's various procedures can provide a union in a position comparable to FEIA's position at Pan American World Airways a range of opportunities, each providing a mechanism (albeit an essentially democratic mechanism) by which a union might be able to extend the current effective reach of its representation. While the NMB could not sit as an adjustment board/arbitration panel and could not grant directly or precisely the relief IUFA has sought by its grievance, that is how Congress intended the NMB to function under the RLA. Under the RLA's statutory scheme as elucidated by most of the courts that have addressed the issue, it is *after* the NMB acts to define how, and by whom, groups of employees in an airline merger or acquisition situation are to be represented, that a union and a carrier, or their arbitrator, may establish or interpret contractual working conditions for them.

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[5] *See, e.g., Pan American World Airways*, 3 NMB 41 (1957) (NMB clarifies old certification of union as representative of Pan Am clericals, and determines that the certification covers clerical employees of Pan Am's subsequently created non-airline [Guided Missile Range] division), and *Chesapeake & Ohio R. Co.*, 4 NMB 215 (1962) (NMB interprets certification covering certain railroad employees not to cover comparable employees of a subsidiary of the railroad).

CONCLUSION

For the reasons outlined above, the petition for a writ of certiorari should be denied.

April 30, 1990

Respectfully submitted,

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